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COMPILATION OF OPINIONS
OF THE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

VOLUME II

Opinion Nos. 51 to 100; June 13, 1934, to August 1, 1934.

Opinion Section,
Office of the General Counsel,
Agricultural Adjustment Administration.

No. 51

APPROPRIATION FOR REMOVAL OF SURPLUS DAIRY
PRODUCTS

Sums expended for the removal of surplus dairy products prior to the passage of the Jones-Connally (Cattle) Act, may not be charged against the appropriations authorized by that Act.

Such sums may be charged against the proceeds of taxes levied pursuant to the Agricultural Adjustment Act with reference to commodities other than milk and its products.

June 13, 1934.

MEMORANDUM TO MR. WARD M. BUCKLES, DIRECTOR OF FINANCE

In reply to your inquiry of June 1, 1934 addressed to Mr. Frank, I submit my opinion upon the following:

QUESTIONS

(1) May sums expended by the Administration prior to April 7, 1934 for the removal of surplus dairy products be charged against the appropriation of \$150,000,000, to enable the Secretary of Agriculture to carry out the purposes specified in Sections 2 and 6 of the Act of April 7, 1934 (Pub. No. 142), which is made by joint resolution of May 25, 1934 (Pub. Res. No. 27)?

(2) May such sums be charged against the proceeds of taxes levied pursuant to the Agricultural Adjustment Act with reference to commodities other than milk and its products, which are appropriated to the use of the Secretary of Agriculture by Section 12 (b) of the Agricultural Adjustment Act?

OPINION

(1) Such sums may not be charged against \$150,000,000 appropriated by the joint resolution of May 25, 1934, to enable the Secretary of Agriculture to carry out the purposes of Sections 2 and 6 of the Act of April 7, 1934.

(2) Such sums may be charged against the proceeds of taxes levied under the Act with respect to commodities other than milk and its products.

DISCUSSION

(1)

Section 2 of the Act of April 7, 1934, commonly known

as the "Cattle Bill", amends subsection (a) of Section 12 of the Agricultural Adjustment Act by adding to it the following paragraph:

"To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions and production adjustments with respect to the dairy and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries."

Section 6 of the Cattle Bill authorizes the appropriation of \$50,000,000 for the following purposes:

"To enable the Secretary of Agriculture to make advances to the Federal Surplus Relief Corporation for the purchase of dairy and beef products for distribution for relief purposes, and to enable the Secretary of Agriculture, under rules and regulations to be promulgated by him and upon such terms as he may prescribe, to eliminate diseased dairy and beef cattle, including cattle suffering from tuberculosis or Bangs' disease, and to make payments to owners with respect thereto."

Pub. Res. No. 27, approved May 25, 1934, appropriated \$100,000,000 pursuant to the authorization contained in Section 2 of the Cattle Bill, and \$50,000,000 for the purposes specified in Section 6. You have inquired whether you may lawfully charge against these appropriations the sum of \$11,250,000 expended for the removal of surplus dairy products prior to the passage of the Cattle Bill.

In 26 C.D. 885 (1920) the Comptroller of the Treasury was called upon to construe a statute making an appropriation for the transportation and interment of the remains of deceased trainees of the Federal Board for Vocational Education. He held the appropriation to be available only for expenses incurred after the passage of the Act, and determined that none of the moneys so appropriated could be disbursed in order to transport or inter the remains of trainees who had died prior to the effective date of the appropriation. Other decisions indicate that appropriation acts, like other statutes, are to be construed as having only prospective operation, in the absence of language clearly showing that the statute was intended to operate retroactively. State vs. Eggers, 33 Nev. 535, 112 Pac. 699 (1910); Davis vs. Steward 198 Ky. 248, 248 S. W. 531 (1923); Cf. 3 C.G. 803 (1924). But Cf. Collaghan vs. Boyce, 17 Ariz. 433, 153 Pac. 773 (1915).

Since the expenditures here in question were made prior to both the Act authorizing and the resolution making the appropriation, it is my opinion that they can not be charged against the \$150,000,000 appropriated under the Cattle Bill. Upon the question whether these moneys would be available for expenditures for the removal of surplus dairy products incurred subsequent to the passage of the Cattle Bill, I express no opinion at this time.

(2)

Section 12 (b) of the Agricultural Adjustment Act provides in part that:

"*** the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection."

You have inquired whether the sums expended for the removal of surplus dairy products, upon the processing of which products no tax has been laid, may be charged against the proceeds of taxes levied upon the processing of other commodities.

There is nothing expressed in the statute which requires the Secretary of Agriculture to allocate the funds realized by a processing tax on a given commodity for disbursement for the benefit of the producers of that commodity alone. In the absence of express language requiring such segregation of proceeds, it is to be assumed that Congress intended that the Secretary should have absolute discretion in the matter of distributing the proceeds of processing and compensating taxes between different classes of producers. To construe the statute otherwise would be to read into it a limitation upon the power of the Secretary which is not expressed or implied therein.

If other provisions of the Act are looked to in order that the statute may be read and construed as a whole, additional

support for this conclusion is apparent. Section 15 (d) provides that where the Secretary determines that payment of a processing tax upon a basic commodity is causing or will cause a shift in consumption to a competing commodity, to the detriment of processors of the basic commodity, a compensating tax shall be levied upon the competing commodity. The proceeds of the compensating tax could not be disbursed for rental or benefit payments to producers of the competing commodity unless it happened also to be a basic commodity, for the Act authorized such payments only to producers of basic commodities. There might be no occasion to justify expenditure of the proceeds to expand the market for or remove a surplus of the competing commodity, or to cover administrative expenses under the Act. The only reasonable conclusion is that the proceeds of a compensating tax are available to be expended for the benefit of commodities other than the competing commodity. The provision governing the expenditure of processing taxes is the same provision which governs the expenditure of compensating taxes, since Section 12 (b) covers all taxes imposed under the Act. Therefore, it may be concluded that Congress intended to impose no limitations upon the disbursement of funds collected by means of processing taxes beyond those which apply to proceeds of compensating taxes.

Furthermore, the proceeds of all taxes are available for administrative expenses. Certainly there was no intent to require the Secretary to determine the amount of over-head expense chargeable to each commodity, and apportion the charges for administrative expenditure according to such determination. If these expenses need not be apportioned, it follows that expenses for removal of surplus need not be so apportioned, since there is no indication that Congress intended administrative expenses to be chargeable in a different manner than expenses for the removal of surplus.

Finally, it is significant that Section 12 (b) authorizes the Secretary to expend the proceeds of taxes for the purposes of removing surpluses of any agricultural products. Since processing taxes can be levied only with respect to basic commodities, Congress must have intended that removal of surpluses of commodities with respect to which no tax is levied should be accomplished with funds realized through processing taxes upon basic commodities or compensating taxes upon other commodities. This circumstance strongly supports the conclusion that there is no requirement that tax proceeds be allocated for the benefit of the particular commodity from which they were realized.

I feel obliged to suggest, however, that it may well be inadvisable as a matter of policy for the Secretary to use funds realized from a tax on one commodity to pay for removal of a surplus of another commodity. Such action might conceivably give rise to dissatisfaction on the part of the producers or processors of the commodity upon which the tax is laid, since they may well

feel entitled to any benefits resulting from expenditure of the proceeds. Compare in this connection the statements of Senators Smith and Norris in the Congressional debates upon the Agricultural Adjustment Act. (Congr. Rec. pp. 1365-66).

I conclude that you may legally charge the sums expended for the removal of surplus dairy products to funds realized from the imposition of any processing or compensating taxes.

Francis M. Shea,
Chief of Brief & Opinion Section,
Office of the General Counsel.

No. 52

PROCEEDS FROM SALE OF CATTLE

All proceeds realized upon the sale of cattle or through salvage from slaughtered cattle, if such cattle have been acquired by the United States with funds appropriated under authority of the Jones-Connally (Cattle) Act in order to effect surplus reductions or to eliminate diseased cattle, must be covered into the Treasury of the United States as miscellaneous receipts, and may not be disbursed except in accordance with a subsequent appropriation.

June 14, 1934.

MEMORANDUM TO COLONEL PHILLIP G. MURPHY, ASSOCIATE
DIRECTOR, DROUGHT RELIEF SECTION

In response to your inquiry of May 28, 1934 addressed to Mr. Frank, I submit my opinion upon the following:

QUESTION

May proceeds resulting from sale by the Federal Emergency Relief Administration of subsistence cattle and the carcasses of products of carcasses of slaughtered cattle, where such cattle have been turned over to the Federal Emergency Relief Administration by the Agricultural Adjustment Administration, be transmitted to the Secretary of Agriculture to be credited against advances furnished by the Agricultural Adjustment Administration?

OPINION

All proceeds realized upon the sale of cattle or through salvage from slaughtered cattle, if such cattle have been acquired by the United States with funds appropriated under authority of the "Cattle Bill" (Pub. No. 142, April 7, 1934) in order to effect surplus reductions or to eliminate diseased cattle, must be covered into the Treasury of the United States as miscellaneous receipts, and can not be disbursed except in accordance with a subsequent appropriation.

DISCUSSION

The Memorandum of Mr. Buckles, in respect to which you have requested an opinion, states:

"In connection with the proposed relief purchases of cattle, it is suggested that an arrangement be made with the Federal Emergency Relief Administration whereby all notes or other proceeds resulting from the handling of subsistence cattle or any salvage from slaughtered animals should be turned over to the Secretary of Agriculture to be applied against advances furnished by the Agricultural Adjustment Administration.

"If, in the stress of emergency, the details of this procedure cannot be fully worked out, it is suggested that the matter be covered by letter from Mr. Hopkins, whereby the Relief Administration holds itself accountable for such proceeds."

According to information furnished by you to Mr. Taylor of my office, in the course of a telephone conversation on June 12, 1934, no advances of money have been made by the Agricultural Adjustment Administration to the Federal Emergency Relief Administration. The Agricultural Adjustment Administration has purchased cattle, using funds appropriated under the Cattle Bill, and has turned the cattle over to the Federal Emergency Relief Administration. Some of the cattle have been sold by the Federal Emergency Relief Administration, and from these sales have been realized notes and other proceeds. Some of the cattle have been slaughtered, and from the carcasses something has been realized by way of salvage. Your inquiry concerns the proper disposition of the proceeds.

It is my opinion that these proceeds must be covered into the Treasury of the United States as miscellaneous receipts, and that they can not be placed to the credit of any existing appropriation. Section 3618 of the Revised Statutes (31 U.S.C.A. § 487) provides in part that:

"All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, * * * shall be deposited and covered into the Treasury as miscellaneous receipts, on account of 'proceeds of Government property,' and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law."

In an opinion by me dated March 1, 1934 (No. 57) I dealt with the question of the proper disposition of receipts from the sale of inedible grease and tankage from hogs purchased under Section 12(b) of the Agricultural Adjustment Act, which authorizes the Secretary to remove surplus agricultural products, and makes an appropriation for that purpose. I there stated:

"The agreements entered into with the packers on August 22, 1933 under the Emergency Hog Program provided for the purchase of hogs by the packers 'for the account of and on behalf of the Secretary of Agriculture.' These hogs were purchased with moneys appropriated under the Agricultural Adjustment Act, and the agreements set forth arrangements for the processing and disposition of the resultant products."

"In the purchase and disposition of these animals the Secretary was exercising a power granted him by the Act to relieve the market of burdensome surpluses under a condition of declared 'economic' emergency'. The hogs were purchased under terms by which they became public property, and the inedible grease and tankage were subsequently disposed of by awards upon public bidding. The problem is whether the proceeds from these sales are available for expenditure at the discretion of the Secretary or whether they must be paid into the Treasury.

"Section 487, 31 U.S.C.A., which requires that the proceeds of the sale of public property shall be paid into the Treasury, is a statutory provision of a general nature. It does not apply to the sale of property held in trust for others. U.S. v. Sirmott, 26 Fed. 84 (1886). But it does apply to 'all proceeds of sales of old material, condemned stores, supplies, or other public property of any kind,' save for certain specified exceptions. Possibly further exceptions might be admitted where essential to the accomplishment of a particular transaction in performance of a statutory duty. There is, however, no such necessity in the present case. The disposition of the money received has no direct relation to the accomplishment of any purpose under the Act. The net effect of holding the money in a special fund available for expenditure by the Secretary would merely be to increase the appropriation originally made by the Act. That it was the object of Section 487 to avoid this result in all situations is indicated by the explicit provision that all receipts from the sale of public property shall be 'covered into the Treasury as miscellaneous receipts, on account of "proceeds of government property", and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law.' No reason is perceived, therefore, why the handling of these moneys should differ in any manner from that applicable to all other receipts from the sale of government property.

"Only the net proceeds of the sale, however, are required to be paid into the Treasury, since Section 489 provides that the expense of the sales, as approved by the General Accounting Office may be paid from the proceeds. Since the proceeds are subject to this deduction, their deposit in a special deposit account pending the determination of the net amount has been allowed by the Treasury. See 19 Comp. Dec. 442; 20 Comp. Dec. 479; 21 Comp. Dec. 374; 4 Comp. Gen. 717.

"In connection with future purchases of surplus commodities, it would seem to violate the principle of Section 487 to stipulate by contract that any part of the proceeds from the sale of such commodities be used for any determinate purpose. In the lease of the Teapot Dome oil reserve it was provided that royalty oil be exchanged for fuel oil and storage facilities, and the lease was held in this respect to be 'inconsistent with the principle upon which rests the law requiring purchase money received on the sale of government property to be paid into the Treasury,' Mammoth Oil Co. v. U. S., 275 U.S. 13 (1927).

"It is true that Section 549, 5 U.S.C.A., provides that the Secretary may sell or 'exchange for other livestock such animals or animal products as cease to be needed in the work of the department.' Such authority to exchange would cover so small a field that it could be only of slight practical benefit in the administration of the emergency program. Furthermore, this provision probably cannot be considered applicable to operations under the Agricultural Adjustment Act.

"The only way, therefore, by which authority could be conferred upon the Secretary to use the proceeds from the sale of surplus commodities for the general purposes of the Act would appear to be by specific amendment of Section 12 (b)."

The considerations which govern the conclusion in the opinion which is quoted also dictate the answer to your present inquiry. Disposition of the proceeds from the sale of cattle purchased to remove a surplus has no direct relation to the accomplishment of any purpose under the Cattle Bill, and to hold such proceeds to the credit of any existing appropriation would operate to increase such appropriation in violation of the provisions of Section 3618. It can make no difference that the proceeds are collected by a governmental agency other than the one which originally purchased the cattle.

I conclude that the moneys referred to in your memorandum should be deposited in the Treasury of the United States and credited as miscellaneous receipts.

Francis M. Shea,
Chief of Brief and Opinion Section,
Office of the General Counsel.

No. 53

AUTHENTICATION OF OFFICIAL
DOCUMENTS OR RECORDS

The Secretary may authorize the Chief Hearing Clerk to authenticate under the seal of the Department of Agriculture copies of documents or records contemplated by Section 661, 28 U.S.C.A.

June 16, 1934

MEMORANDUM TO MR. ARTHUR BACHERACH

Pursuant to your inquiry of April 24th I reply as follows:

QUESTION I

Can the Secretary legally delegate to the Chief Hearing Clerk power to authenticate under the seal of the Department of Agriculture copies of documents or records contemplated by Title 28, Section 661 of the U.S.C.A.?

OPINION

Since the Statute requires merely that the transcripts be authenticated under the seal of the Department and it has been held that the affixation of the seal by a subordinate officer satisfies the requirements of the statute, it is submitted that no problem of delegation is involved and that the Chief Hearing Clerk may seal the transcripts under the statute without express authorization. Assuming, however, that a formal delegation is desired, sealing is a ministerial act which may be delegated to an inferior officer, and the Chief Hearing Clerk may, as deputy of the Secretary for this purpose, authenticate copies of documents under this Act.

DISCUSSION

Title 28, Section 661 of the U.S.C.A. provides as follows:

"Copies of any books, records, papers or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof. (R. S. § 882)."

From the clear terms of this statute it is evident that there is no indication that the seal must be personally affixed by the head of the department. The requirement stated is simply that the copy be authenticated under the seal of the department. That this is the correct interpretation of the provision may be seen from the case of Smith v. United States, 30 U. S. 290 (1831), where the Supreme Court had occasion

to pass precisely on the point here in question. The issue there before the Court was whether a copy of a document in the Treasury department satisfied the requirements of this Section (then Section 882) where the seal was affixed to the transcript by the auditor rather than by the Secretary himself. The Court said at page 300:

"By the second section of the act of the 3d March 1797, it is provided, that in every case of delinquency, where suit has been, or shall be instituted, a transcript from the books and proceedings of the treasury, certified by the register (or under the act of the 3d March 1817, by the auditor), and authenticated under the seal of the department, shall be admitted as evidence. 'And all copies of bonds, contracts or other papers, relating to, or connected with, the settlement of any account between the United States and an individual, when certified as aforesaid, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers, if produced and authenticated in court.'

The auditor certifies, that the foregoing 'transcripts are true copies of the originals on file in his office.' It is the certificate of the auditor, and the seal of the department, which makes the transcript evidence. If either be omitted, whatever the transcript may purport upon its face, it is not evidence. Where copies are made evidence by statute, the mode of authentication required must be strictly pursued. The legislature may establish new rules of evidence, in derogation of the common law, but the judicial power is limited to the rule laid down.

- * * * * *

The objection, that the signature of the secretary of the treasury was signed by his chief clerk, seems not to be important. It is the seal which authenticates the transcript, and not the signature of the secretary; he is not required to sign the paper. If the seal be affixed by the auditor, it would be deemed sufficient under the statute. The question, therefore, is not necessarily involved, in deciding this point, whether the secretary of the treasury can delegate to another the power to do an official act, which the law devolves on him personally."

The view that it is unnecessary to the validity of the seal that it be affixed by the head of the department is reinforced by the express language of the Section in which the seal of the Department of Agriculture is established. Title 5, Section 513 of the U. S. C.A. provides:

"The Secretary of Agriculture is authorized and directed to procure a proper seal, with such suitable inscriptions and devices as he may approve, to be known as the official seal of the Department of Agriculture, and to be kept and used to verify official documents, under such rules and regulations as he may prescribe."
(Aug. 8, 1894, c. 238 § 1, 28 Stat. 272).

It is apparent from the plain terms of the above statute as well as from the other evidence adduced that the affixation of the seal is not to be regarded as a personal duty of the Secretary. No problem of such a delegation is, therefore, involved in the question of whether the seal may be affixed by a subordinate officer and since Section 661 requires merely the presence of the seal on the transcript to make it admissible as evidence, it follows that a procedure involving the affixation of the seal by the Chief Clerk would be perfectly valid under this statute without the formality of an express delegation of authority.

Additional support for the position here maintained is found in the strong presumption that the use of the seal is a lawful use. Mullanphy Savings Bank v. Schatt, 135 Ill. 655, 25 N.E. 640(1891); Burrill v. Nahant Bank, 2 Meto. (Mass.) 163, 35 Am. Dec. 395 (1847); St. Louis Public Schools v. Bisley 28 Mo. 415, 75 Am. Dec. 131 (1859); Musser v. Johnson, 42 Mo. 74, 97 Am. Dec. 316 (1867); Berks, etc., Turnpike Road v. Myers, 6 Seag. & R. (Pa.) 12, 9 Am. Dec. 402 (1820). The basis of this presumption is well explained by Wigmore in his work on evidence, Section 2162, page 2933, where he says:

"The doctrine of the seal is an instance of declaring that sufficient evidence of genuineness exists on the general principle of authentication. The fact constituting this sufficient evidence is the existance upon the document of an impression or writing purporting to be the official seal or signature, and this may well serve as sufficient evidence, because the forgery of the seal or signature would be a crime and detection would be fairly easy to certain."

The burden would therefore be placed upon the party objecting to show that the affixation of the seal by a subordinate of the Secretary does not constitute sufficient compliance with the statute to make the transcript admissible as evidence. It has been seen that even if the question were raised in the face of the presumption, that such a procedure would be legally unimpeachable. Accordingly, it is submitted that the Chief Hearing Clerk may affix the seal of the Department of

Agriculture to copies introduced as evidence under Section 661 of the U.S.C.A. and that no formal delegation of authority to him to do this is necessary.

It may also be noted that no case involving a delegation of authority to use a seal in a closely analogous situation has been found. In view of this fact and of the above analysis of the requirements of the statute, a formal delegation of such authority might result in gratuitously raising issues which would be avoided by a simple compliance with the Act.

However, if such a delegation is necessary for reasons of policy, authority for such a course exists. It has been seen above that neither the statute establishing the seal for the Department of Agriculture nor the Act which makes authenticated copies admissible as evidence requires the Secretary personally to affix the seal. Moreover, the former statute provides that the seal may be used under such rules and regulations as the Secretary may prescribe. In addition it has been held specifically that the affixation of a seal is a ministerial act (Berks and Dauphin Turnpike Road v. Myers, 6 Seag. & Rawle 12, 9 Am. Dec. 402 (1820)) and that authority to affix a seal may be delegated (Burrill v. Mahant Bank, 2 Metc. 163, 35 Am. Dec. 395 (1840) delegation by board of directors to a committee of authority to use corporate seal). It follows that the Secretary could by regulation designate the Chief Hearing Clerk or his deputy for the purpose of affixing the seal of the Department. Authentication of transcripts by deputies of public officers has been sanctioned in several cases. Thus in Steinke v. Graves, 16 Utah 293, 52 Pac. 386 (1898) it was held that a record of a court of another state certified by a deputy of the clerk is sufficiently authenticated. The court said at page 387:

"The attestation of the record in question purports to have been the attestation of the clerk. The law quoted (§ 905 Rev. Stat. U.S.) required the clerk's name to the certificate signed by himself, or his deputy, with legal authority to do so. In either case it would, in law, be the clerk's signature, and the certificate would be his. Ministerial duties of a public officer may be discharged by a deputy while judicial duties cannot The weight of authority appears to be that the name of the clerk may be signed to his certificate to a transcript to be used in evidence by his deputy."

Similarly, in National Ass.. Soc. v. Spiro, 37 C.C.A. 388, 94 Fed. 750 (1889) an exemplified copy of a record authenticated by a deputy clerk was held to be admissible as evidence. The court said at page 751

"Although the certificate here was made by the deputy clerk, that officer is by statute authorized, in the absence of the clerk, to do and perform all

the duties pertaining to the office; and, in general, a deputy of a ministerial officer can do every act which his principal might do."

And in The Confiscation Cases, 87 U. S. 92 (1873) the court said at page 111

"Another objection urged against the proceedings in the District Court is, that the warrant, citation and monition was not signed by the clerk of the court. It was attested by the judge, sealed with the seal of the court, and signed by the deputy clerk. This was sufficient. An act of Congress authorized the employment of the deputy, and in general, a deputy of a ministerial officer can do every act which his principal might do."

See also Wigmore on Evidence, Section 1633, subsection 8. It may be concluded therefore that the Chief Hearing Clerk, acting as deputy of the Secretary for that purpose could validly authenticate under the seal of the Department of Agriculture copies of records contemplated by Title 28, Section 661 of the U.S.C.A.

Question II

Assuming that the Secretary can legally delegate to the Chief Hearing Clerk the power to affix the seal of the Department to copies contemplated by Title 28, Section 661, should this be done by General Regulations?

Opinion

A general regulation appointing the Chief Hearing Clerk deputy of the Secretary for the purpose of affixing the Seal of the Department to transcripts contemplated by Section 661 of the U.S.C.A. would be the most feasible method of making such an express delegation of authority.

Discussion

On the assumption that an express delegation of authority to the Chief Hearing Clerk to affix the Secretary's seal to transcripts under Section 661 of Title 28 of the U. S. C. A. is believed to be expedient, it would appear that a General Regulation making the Chief Clerk the deputy of the Secretary for this purpose, would be the most feasible method of accomplishing this end. The emphasis laid in the cases cited on Page 5 on the fact that the action of the deputy in

authenticating the transcript in question was authorized by law prompts this conclusion. This result may be obtained under Title 5, Section 22 of the U.S.C.A. which provides:

"The head of each department is authorized to prescribe regulations not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

It has been held that a regulation prescribed by the head of a department within Title 5 Section 22 of the U.S.C.A. has the force of law. Cuba v. U.S., 152 U.S. 221 (1894); ex parte Reed, 100 U.S. 13 (1879), 21 Op. Atty. Gen. 122 (1895). It follows that the Chief Hearing Clerk, acting as the lawful deputy of the Secretary would come under the rule laid down in the above cases, and the transcript would be admissible as evidence despite the fact that the superior officer did not authenticate the transcript himself.

Francis M. Shea,
Chief of Brief and Opinion Section.

No. 54

EFFECT OF FAILURE OF MARKET ADMINISTRATOR
TO GIVE BOND

The Administrator, notwithstanding his failure to give the required bond before entering upon his duties, is a de jure officer. Even if he were not a de jure officer, he would at least be a de facto officer and, as such, his acts would be binding upon the general public.

Opinion Section Memorandum No. 123
Dated June 16, 1934

June 16, 1934.

MEMORANDUM TO MR. BACHRACH.

In reply to your inquiry as to whether, in injunction proceedings against a licensee under the Chicago Milk License, effective February 5, 1934, the actions of the Chicago Milk Market Administrator may be successfully challenged because of his failure to give the bond required before entering upon his duties, I submit the following:

OPINION

The Administrator, notwithstanding his failure to give the required bond before entering upon his duties, is a de jure officer. Even if he were not a de jure officer, he would at least be a de facto officer and as such his acts would be binding upon the general public.

License Requirement as to Administrator's Bond

"The Market Administrator shall, before he enters upon his duties, execute and deliver to the Secretary his bond in such amount as the Secretary may determine with surety thereon satisfactory to the Secretary conditioned upon the faithful performance of his duties as such Market Administrator." (Exhibit A, Section E)

DISCUSSION

(1)

The Administrator is an officer de jure, notwithstanding his failure to give the required bond.

It is the general rule that the giving of a bond, when an officer is appointed under a statute requiring that he give bond, is not a condition precedent to his right to exercise the functions of his office. United States v. Bradley, 35 U.S. (10 Pet.) 341, (1836) was an action upon an undertaking which did not conform to statutory provision requiring that certain officers "shall, previous to entering upon the duties of their respective offices, give good and sufficient bonds to the United States". Against

the contention of the Government that the officer, having failed to give the required bond, was at most only an officer de facto, the court said:

"Before concluding this opinion, it may be proper to take notice of another objection..... It is, that Hall was not entitled to act as paymaster, until he had given the bond required by the act of 1816, in the form therein prescribed; and that not having given any such bond, he is not accountable as paymaster for any moneys received by him from the government. We are of a different opinion. Hall's appointment, as paymaster, was complete, when his appointment was duly made by the President, and confirmed by the senate. The giving of the bond was a mere ministerial act, for the security of the government, and not a condition precedent to his authority to act as paymaster." (p.364)

The same distinction was reaffirmed in United States v. Linn, 40 U. S. (15 Pet.) 290 (1841), an action on the bond of a receiver of public moneys. The statute directed that such officers should give bond before entering upon the duties of their office, and the validity of the instrument given was attacked because it was not under seal. The court stated that "his official rights and duties attached upon his appointment" and, referring to the Bradley case, supra, remarked:

"According to this doctrine, which is undoubtedly sound, Linn was a receiver, de jure, as well as de facto, when the instrument in question was given." (P.313)

Undoubtedly Congress may provide that the giving of a bond be a condition precedent to a right to exercise the functions of an office. See Glavey v. United States, 182 U. S. 595, 604-5 (1901). But to do so more is required than merely a provision that the bond shall be given before the duties of the office are entered upon. Even so, the defective title may, it appears, be cured by giving bond subsequently, which action would then be related back to the date of the appointment or the time when the bond should have been given. Thus, it is said in State v. Carroll 57 Wash. 202, 106 Pac. 748, 750. (1910):

"So, also the failure to give a bond does not render an officer duly elected or appointed a de facto officer. He is a de jure officer, holding by a defeasible title. Foot v. Stiles, 57 N. Y. 399.

The giving of a bond is a mere ministerial act for the security of the government, and not a condition precedent to the officer's authority to act, unless especially made so by statute. *Glavey v. United States*, 182 U. S. 395, 21 Sup. Ct. 891, 45 L. Ed. 1247. The courts generally hold that, even though the statute expressly provides that, upon a failure to give a bond within the time prescribed, the office shall be deemed vacant, and may be filled by appointment, the default is a ground for forfeiture only, not forfeiture ipso facto, and that if, notwithstanding such default, the state or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured, and it is a title de jure, having relation back to the time of his election or appointment. *People ex rel. Bennett v. Benfield*, 80 Mich. 265, 45 N. W. 135."

In the present case, the License requires that the Market Administrator "shall, before he enters upon his duties, execute and deliver" a bond satisfactory to the Secretary. The requirement is therefore like that in the *Bradley* and the *Linn* cases, *supra*. The requirement is made for the security of the government and therefore properly calls for the delivery of the bond before the duties of the office are assumed. But it does not make the giving of a bond a condition of his appointment, or a *sine qua non* of his authority to perform the duties of the office. The Administrator is accordingly a *de jure* officer, notwithstanding his failure to give bond.

(2)

If not a *de jure* officer, the Market Administrator is an officer *de facto*.

To sustain the validity of the Administrator's actions as against third parties, it is not necessary to rely solely upon the conclusion, reached above, that he is an officer *de jure*. When the giving of a bond is construed to be such a condition precedent that the officer has no title until it is given, one who has not complied with the conditions but who fills an office under color of authority is at least an officer *de facto*.

In *Merchants' & Planters' Bank v. Citizens Bank of Hazlehurst*, 147 Ga. 366, 94 S. E. 229 (1917), the participation of a certain county officer

in the selection of a depository of public funds was deemed illegal because under the law he could not begin the duties of his office until he had qualified and given a bond to be approved by the judge of the superior court, and he had not thus qualified at the time of the action attacked. It was held, however, that he was a de facto officer, and that his acts as such were valid. The court cited Crawford v. Howard, 9 Ga. 314, to the effect that "a sheriff duly elected, but not having executed a bond according to law... is an officer de facto, and his acts are valid when they concern the public or third persons who have an interest in them".

Failure to give bond and failure to take oath are similarly treated in so far as their effect on the validity of the acts of an officer is concerned. In Aiken v. Sidney Steel Scraper Co., 197 Mo. App. 673, 198 S. W. 1139 (1917), it was held that the failure to take the oath required by a statute does not invalidate the actions of an officer duly commissioned. As stated at 1142, "The oath of office does not make the individual an officer. It merely relates to the manner in which he shall perform the duties of the office". The opinion cited also states that:

"a failure to qualify by filing a bond when required does not vacate the office. State v. Churchill, 41 Mo. 41; State v. County Court, 44 Mo. 230." (at 1142)

The rule that a person may become a de facto officer without complying with statutory requirements regarding bonds is applied also in Thompson v. Ferguson. (Ind.) 102 N.E. 965 (1913); Chancery v. State (Ala.) 54 So. 522 (1911); see also Odem v. Sinton Independent School District. (Tex.), 234 S. W. 1090, 1092 (1921).

(3)

As a de facto officer, the Market Administrator's title cannot be collaterally attacked and his actions as such are binding on the public.

The right or title to an office, and the validity of acts done while exercising the duties of an office, are distinct problems. See County of Ellis v. Douglass. 105 U. S. 728, 730 (1881). This was pointed out in a habeas corpus case in which the title of the judge who had conducted criminal proceedings was challenged, where the Supreme Court said: (Ex parte Ward, 173 U. S. 452 (1899))

"The result of the authorities is that the title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked."

Likewise, in McDowell v. United States, 159 U.S. 595, (1895), the plaintiff in error, who has been convicted in a criminal proceeding, contended that the proceedings were void because conducted by an improperly designated judge at an unlawful term of court. The Court, held that the judge was at least an officer de facto, and that his acts, as such, were binding upon the public.

"Whatever doubt there may be as to the power of designation attaching in this particular emergency, the fact is that Judge Seymour was acting by virtue of an appointment, regular on its face, and the rule is well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer de facto and binding upon the public. Of course, if he was judge de facto his orders for the continuance of the term from day to day until February 12, when the regular judge took his place upon the bench, were orders which cannot be questioned, and the term was kept alive by such orders until Judge Brawley arrived." (pp. 601-602).

To similar effect see also In re Manning, 139 U.S. 504, 506 (1891); and Ball v. United States, 140 U.S. 118, 128 (1891). The rule is general, and not confined to any particular type of office. See Waite v. Santa Cruz, 184 U. S. 302, 322 (1902); Nofire v. United States, 164 U.S. 657, 661 (1897).

The reasons for sustaining the validity of the acts of de facto officers are set forth in Norton v Shelby Co., 118 U.S. 425 (1886), an action on bonds issued by county commissioners, which were held void because the state court had held that no such office could constitutionally exist under the laws of the state and because "since no office had been created, there could be no officer, either de jure or de facto, to fill it." In discussing the rule concerning de facto officers, the Court said: (at 441)

"The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such

offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined." (pp. 441-42)

In State v. Douglass, 50 Mo. 593, 596, it was said that

"without this rule the business of a community could not be transacted. The public are necessarily compelled to do business with an officer who is exercising the duties and privileges of an office under color of right, and to say that his acts as to strangers should be void would be productive of irreparable mischief. It would cause a suspension of business till every officer's right de jure was established."

In proceedings, therefore, in which the validity of the acts of a person purporting to exercise official authority is attacked by members of the public affected thereby, the only question which is open to attack is whether such person was acting under color of authority as a public officer. See County of Falls v. Douglass, 105 U. S. 728, 730 (1881). If he was so acting, defects in the manner of his appointment will not affect the validity of his acts.

Francis M. Shea,
Chief of the Brief and Opinion Section,
Office of the General Counsel.

No. 55

DEMURRAGE CHARGES ON EXPORT WHEAT

The Secretary is not obligated to pay the demurrage charges accruing against the North Pacific Emergency Export Ass'n upon wheat purchased under the Marketing Agreement for the Disposal of the North Pacific Wheat Surplus, where the unloading, of the wheat is delayed by strike conditions.

Neither the Secretary of Agriculture nor the North Pacific Emergency Export Ass'n is responsible for demurrage charges accruing against the members of the Association.

The Secretary has the power to assume the demurrage charges if such action will assist in the "removal of surplus agricultural products." However, in view of the doubt as to whether payment of such charges can be said to aid in the removal of the surplus wheat, it is inadvisable for the Secretary to make such expenditures in the absence of a ruling by the Comptroller General sustaining his authority to do so.

The Association, with the approval of the Secretary, may permit its members to sell wheat at a date later than that specified in the Association's contracts with its members, and may allow the member to cancel his contract to purchase wheat from the Association if additional obligations are not thereby placed upon the Government.

(See also Opinion No. 103 (Opinion Section Memorandum No. 148)).

June 21, 1934.

MEMORANDUM TO MR. PRESSMAN

Pursuant to your request, I submit herewith an opinion upon questions arising under the following facts:

STATEMENT OF FACTS

The North Pacific Emergency Export Association, pursuant to the Marketing Agreement for Disposal of North Pacific Wheat Surplus, has purchased a large quantity of wheat for sale in the export trade. The wheat has been purchased, as provided in Exhibit A of the marketing agreement, on the basis No. 1 Federal Grades, sacked, delivered on track at tidewater terminal markets. Due to the strike of the longshoremen, which started May 9th and is still in effect, it is impossible for the steamship companies to secure stevedores to work the ships and, additionally, the Association has been unable to unload the wheat cars at the terminal tracks. The demurrage charges are thus rapidly mounting. The Association has in some instances assigned the wheat purchase contracts to members of the Association to apply against their export sales, in which event the demurrage charges are daily accruing against the Association members. Moreover, certain members of the Association desire to modify or cancel their contracts to purchase wheat from the Association for sale in the export trade due to the inability of the members, because of strike conditions, to fulfill their contracts with foreign customers. Under this factual situation the following questions arise:

QUESTIONS

1. Is the Secretary of Agriculture obligated to pay the demurrage charges accruing against the Association on wheat which it has purchased under the marketing agreement pursuant to the direction of the Secretary of Agriculture, or his agent, and which it is unable to export directly or sell to its members for export because of strike conditions?

2. Is the Secretary of Agriculture or the Association obligated to pay the demurrage charges

accruing against members of the Association on wheat which they have purchased from the Association for sale in the export trade and which, because of strike conditions, they are unable to unload from the cars at the terminal tracks?

3. May the Secretary of Agriculture assume responsibility for the demurrage charges accruing against the Association or the members of the Association?

4. May the Association, together with the Secretary of Agriculture, permit a member of the Association to modify or cancel his contract to purchase wheat from the Association for the sale in the export trade?

OPINION

1. The Secretary of Agriculture is not obligated to pay the demurrage charges accruing against the North Pacific Emergency Export Association.

2. Neither the Secretary of Agriculture nor the North Pacific Emergency Export Association is responsible for demurrage charges accruing against the members of the Association.

3. The Secretary of Agriculture has the power to assume responsibility for the payment of demurrage charges if such action will assist in the "removal of surplus agricultural products". Since, however, it is extremely doubtful whether payment of demurrage charges can be said to aid in the removal of the surplus wheat, I cannot advise that the Secretary may make such expenditures in the absence of a ruling by the Comptroller-General sustaining the Secretary's authority to do so.

4. The Association, with the approval of the Secretary of Agriculture, may permit its members to sell wheat at a date later than that specified in the Association's contracts with its members. In addition, the Association, with the approval of the Secretary of Agriculture, may allow a member to cancel his contract to purchase wheat from the Association if additional obligations are not thereby placed on the Government.

1. The Secretary of Agriculture is not obligated under the marketing agreement to pay the amount of the carrying charges accruing against the Association.

The marketing agreement by Section 4 thereof provides that the

Secretary of Agriculture may instruct the Association to purchase wheat for sale in the export trade. The Association, with respect to the wheat so purchased may under Section 5 of the marketing agreement sell the wheat directly in the export trade or may allow members of the Association to purchase the wheat from the Association with the members making the sale in the export trade. The Secretary, moreover, agrees in Section 8 to pay to the Association an amount equal to the difference between the purchase price of the wheat and the net sales price. With respect to the money so paid to the Association, the marketing agreement provides that it shall reimburse itself for the cost which has been incurred (in accordance with the schedule set forth in Exhibit B) over and above the purchase price prior to the transfer of the wheat contracts to the members of the Association. Thus, the Secretary does not assume any liability for carrying charges accruing against the Association unless a provision is made in regard thereto by Exhibit B. However, Exhibit B contains but one provision relative to carrying charges, to-wit:

"The following schedule of items and amounts is to be allowed in the cost of handling wheat and is to be deducted from the sales price to determine the net sales price.

* * *

- f. Carrying charges beginning 20 days after delivery in tidewater terminal elevators, 1/30 of a cent per bushel per day until loaded f.o.b. steamer." (Italics supplied)

Thus, if the wheat has been stored in tidewater terminal elevators, the Secretary will, twenty days after delivery thereto, pay all carrying charges accruing against the Association. However, it appears that the wheat cars have arrived at elevators and cannot be unloaded due to strike conditions. The marketing agreement does not obligate the Secretary to assume liability for this unforeseen cost to the Association.

- II. Neither the Secretary of Agriculture nor the Association is obligated by the marketing agreement to pay the carrying charges accruing against the members of the Association.

Where the members of the Association have purchased wheat, basis f.o.b. and are unable to unload the wheat cars because of conditions arising out of the strike of the longshoremen, the demurrage charges are daily mounting. The marketing agreement makes no provision allowing discounts for demurrage charges under these circumstances. On the other hand, the marketing agreement specifically provides for the payments which are to be made to the members of the Association in connection with the purchase and sale of wheat in export trade. By

Section 8 of the marketing agreement the Secretary of Agriculture agrees to pay to the Association for wheat exported pursuant to Section 5 an amount equal to the difference between the purchase price and the net sales price of the wheat. The Association in turn agrees to distribute such funds to the members in an amount equal to the difference between the purchase price which such members have paid for the contracted wheat and the net sales price received in connection with the sale of such wheat. Exhibits A, B and C providing for the discounts to be allowed in ascertaining the purchase price and the net sales price, make no provision for carrying charges where the wheat cars remain unloaded. Thus, it appears that the members of the Association must pay the demurrage charges under the existing provisions of the marketing agreement and there is no obligation on the Secretary of Agriculture or on the Association to assume this burden.

III. It is doubtful whether the Secretary of Agriculture has the power under the Agricultural Adjustment Act to pay the demurrage charges on behalf of the Association or the members thereof.

Considerations of policy may make it desirable for the Secretary of Agriculture to assume the obligation of paying the carrying charges, although there is no duty on his part to do so. In approaching the question as to the authority of the Secretary to make these payments, it is advisable to ascertain the sources of his power to make any payments under the North Pacific Marketing Agreement. Section 12 (b) of the Agricultural Adjustment Act, in part, provides:

"In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products***"
(Italics supplied)

That the Secretary relied on this provision is indicated by the fifth clause of the preamble of the marketing agreement which declares:

"Whereas, pursuant to the Agricultural Adjustment Act, the parties hereto, for the purpose of correcting the conditions now obtaining in the production of wheat in the aforesaid area and the distribution thereof, and to effectuate the declared policy of said Act, desire to enter into a marketing agreement under the provisions of Section 8 (2) and 12 (b) of the Act;"

Section 12 (b) places no limitation on the payments which the Secretary of Agriculture may make in providing for the removal of surplus agricultural products. There is serious doubt, however, whether the payment of the demurrage charges by the Secretary will aid in the "removal of surplus agricultural products." The disposal of the surplus wheat is

hampered by the strike conditions preventing an unloading of the wheat cars, not by the accrual of demurrage charges. Of course, it may be argued that the members of the Association will hereafter hesitate to contract with the Association for the removal of surplus wheat if they must bear the brunt of paying for costs arising out of unpredictable conditions. The remote possibility that the members will become thus skeptical of the plan set forth in the marketing agreement and that the program for the disposal of surplus wheat will be hampered thereby appears, however, to be a very tenuous basis on which to predicate the power of the Secretary of Agriculture to pay the demurrage charges.

Even if this difficulty is surmounted certain cases involving the power of Government officers to modify or cancel contracts which they have made on behalf of the United States may be thought to limit the power of the Secretary of Agriculture to pay the demurrage charges in the present instance. Thus, where a contractor enters into an agreement with a Government officer to furnish supplies to the United States, the officer may not thereafter assume responsibility on behalf of the United States for the loss in transit of part of the goods. 26 Decisions of the Comptroller of the Treasury 523. The Comptroller held that such an action by the officer would constitute a variation of the original contract and the abandonment of a part of the Government's rights thereunder without compensatory advantage to the United States, and that, therefore, such action was invalid. Moreover, the Attorney General has held that the Secretary of the Treasury has no authority to relieve a contractor from the performance of his agreement to furnish supplies to the Government because of the increased price thereof incident to a European war. 30 Opinions of the Attorney General 301; See also: 26 Decisions of the Comptroller of the Treasury 396; 21 Opinions of the Attorney General 115.

The above cited cases are, however, distinguishable. The statutes authorizing public officers to enter into the contracts contain no provision for an independent fund similar to that provided for by Section 12 (b) of the Agricultural Adjustment Act which, as has hereinbefore noted, provides for the use of proceeds from the processing taxes for the removal of surplus agricultural products. Section 8 (2) of the Act empowering the Secretary to enter into marketing agreements clearly places no limitation upon the applicability of Section 12(b). Thus, if the Secretary, enters into an agreement under Section 8(2) and unforeseen charges are incurred thereunder by parties to the agreement, Section 12(b) is sufficient authorization for the Secretary to assume responsibility for such obligations if his action thereby aids in the removal of surplus agricultural products. It might be urged that the decisions of the Attorney-General and the Comptroller-General referred to above would bar the use of funds appropriated under Section 12(b) to procure goods or services which the United States is already entitled to under contract. But this objection is not well-taken, for the contractor is under no obligation to the United States to pay demurrage. That obligation runs to the railroad, and payment of the demurrage charges is not, therefore, anything which the United States is already contractually entitled to.

Since it is very doubtful, however, whether payment of these charges bears any reasonable relation to the statutory purpose of removing surplus agricultural products, I cannot advise payment of the charges until the Comptroller-General has ruled on the question of the Secretary's authority to make such expenditures.

IV. The Association, with the approval of the Secretary of Agriculture, may modify or cancel its contracts to sell wheat to its members for sale by them in foreign markets if additional obligations are not thereby placed on the Secretary of Agriculture.

The strike of the longshoremen, which started on May 9th, has made it impossible for steamers to receive their cargoes. The available information indicates that several ships, after waiting a reasonable length of time, have left Pacific northwest ports without taking cargo and others are expected to leave at any time. Inasmuch as these ships are canceling or are expected to cancel the space booked by the members, and as the foreign customers are likely to refuse to take the wheat at a deferred date, the members of the Association will probably be desirous of canceling their contracts to purchase wheat from the Association or will seek to be allowed to ship the wheat at a date later than that specified in the contracts. The marketing agreement makes no provision for modification or cancellation of the Association's contracts with its members, and obviously the members of the Association cannot demand as of right a cancellation or modification. They have agreed to purchase wheat from the Association and have contracted for the sale of the wheat to foreign customers. The fact that due to the strike of the longshoremen they cannot fulfill their contracts with the third parties or that great hardship will be caused thereby does not relieve members of their obligations to fulfill their contracts with the Association.

The question, however, remains whether the Association has the power to cancel or modify its contracts with the members of the Association if it desires to do so. Since the Association, under the marketing agreement, cannot enter into contracts with its members except where the Association acts pursuant to the instructions of the Secretary, the latter's approval would appear to be requisite for the modification or cancellation of such contracts. There does not seem to be any valid objection to the Association, with the acquiescence of the Secretary of Agriculture, permitting a member of the Association to ship wheat at a date later than that specified in the member's contract with the Association since such a modification places no additional obligation on either the Secretary or the Association. That the Secretary may approve a modification of a contract between the Association and its members appears clear. Even where a contract exists between the Government and an individual, the public officer making the contract on behalf of the Government may modify or cancel it if the interests of the United States are not thereby prejudiced. 18 Opinions of the Attorney General 101: 8 Decisions of the Comptroller of the Treasury 549; 2 Decisions of the Comptroller of the Treasury 182.

In addition, the Association, with the approval of the Secretary of Agriculture, seemingly may permit the cancellation of a contract between the Association and a member thereof if additional obligations are not thereby placed on the Government. If, however, due to a falling market or other causes, additional burdens result from a cancellation of a contract, the Secretary of Agriculture has no power to assume the obligations unless this power is granted him by Section 12 (b) of the Agricultural Adjustment Act, which makes the proceeds from the processing taxes available to the Secretary of Agriculture for the removal of surplus agricultural products. However, cancellation of a contract between the Association and its members and the assumption by the Secretary of Agriculture of the burdens resulting therefrom will not normally aid in the "removal of surplus agricultural products," for in most instances the member will dispose of the wheat abroad.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 56

AGREEMENT NOT TO SELL TO PERSONS

NOT PARTIES TO MARKETING

AGREEMENT

A provision in a crop reduction contract, by which the producer agrees not to sell rice to any miller who is not a party to the Rice Millers Marketing Agreement, is valid and constitutes no violation of the anti-trust laws when it can be shown to be reasonably related to the accomplishment of the crop reduction program.

June 22, 1934.

MEMORANDUM TO MR. A. J. S. WEAVER
Chief, Rice Section

In reply to your memorandum of May 5, 1934, I submit my opinion upon the following:

QUESTION

May the Secretary enter into a Rice Reduction Contract by which the producer agrees not to sell rice produced in 1934 to any miller who is not a party to the Rice Millers Agreement?

OPINION

Such an agreement is within the authority of the Secretary under Section 8 (1) and constitutes no violation of the antitrust laws only if such an agreement is shown to be reasonably related to the accomplishment of the crop reduction program.

Statement of Facts

The proposed plan for reducing the production of rice and for insuring the marketing of the rice produced under conditions which will effectuate the declared policy of the Agricultural Adjustment Act contemplates a combination of crop reduction contracts, to be entered into with southern rice producers, and a Marketing Agreement with southern rice millers. Under the Marketing Agreement, the millers agree to pay a certain set price for all rice purchased, such payment to be made, 60% to the producer, and 40% to the Secretary. The amount paid to the Secretary is to constitute a trust fund to be distributed to producers who cooperate in the reduction program. The crop reduction contracts to be entered into with producers provide for payments to such cooperating producers. It is proposed to insert in these contracts a clause by which the contracting producer will agree not to sell to any miller who is not a party to the Rice Millers Marketing Agreement. The object of this clause is to assure that all millers will become parties to the Marketing Agreement and thus provide the payments into the trust fund designed to make available funds for compensating cooperating producers.

It is understood that not all features of the plan have been finally determined upon. In this opinion, therefore, we confine ourselves strictly to the question as stated above, with general reference only to

acrop reduction program of the character indicated; and without attempting to pass upon the validity of other features of such program.

Discussion

Section 8 (1) provides that in order to effectuate the declared policy, the Secretary shall have power

"To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods * * *"

By Section 8 (2), as amended, he is authorized

"After due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others * * *"

An agreement entered into by the Secretary with a producer by which the producer agrees not to sell rice to a miller who is not a party to the Rice Millers Agreement might itself be regarded as a marketing agreement, but the Secretary is not authorized to enter into such an agreement except "after due notice and opportunity for hearing".

By Section 8 (1) the Secretary is given authority, independent of that conferred in Section 8 (2), to enter into agreements with producers for reduction in production, or to provide for such reduction in production by other voluntary methods. Upon the issue of whether or not the proposed agreements with producers can be brought within the terms of Section 8 (1), the question arises immediately as to whether it is essential, in order to bring an agreement with producers under the authority conferred by this section of the Act, that the agreement provide for rental or benefit payments. The section in question authorizes the Secretary "to provide for * * * reduction in the production for market * * * of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith * * *". This is subject to two possible interpretations: (1) That the Secretary has discretionary power to enter into agreements for reduction in production for market and in addition discretionary power to provide benefit payments in connection with such agreements, and (2) that the Secretary is authorized to enter into agreements for reduction in production for market on condition that he provide rental or benefit payments in connection therewith. As Section 8 (1) constitutes an enumeration of discretionary powers conferred upon the Secretary (the discretionary character of the powers is clearly evidenced by the introductory sentence of Section 8; and the fact that certain of the powers under Section 8 (1) require conditions for their exercise not required by the others clearly points to an enumeration of distinct powers) the more reasonable interpretation would seem to be that these powers were independent rather than limited to a conjunctive use.

These agreements which the Secretary is authorized to enter into under Section 8 (1) of the Act are not subject to the requirements of notice and opportunity for hearing. The proposed provision by which the producer obligates himself not to sell to millers not parties to the marketing agreement is to be incorporated in an agreement of this character, and its validity is therefore to be determined by the extent of the authority conferred upon the Secretary by Section 8 (1).

In entering into such agreements the Secretary is necessarily limited by the purposes for which such agreements are authorized, i.e., the general purpose of effectuating the declared policy of the Act and the particular purposes set forth in Section 8 (1) which includes "reduction in production for market". No specific limitations with respect to the terms of such agreements are imposed; in exercising the general power thus conferred the Secretary necessarily must exercise a wide discretion. It is accordingly within the scope of his authority to incorporate in such agreements any provision, not in violation of the Constitution or of any controlling statute, which is reasonably related to the accomplishment of the purposes specified. See 30 Op. Atty. Gen. 197, 200 (1913), but it must be shown that the provision will secure a reduction in production for market.

While it may be the object of the proposed provision to assure the efficient operation of the reduction program, it does not clearly appear from the facts in hand that it is reasonably designed to accomplish this end. Its effectiveness in bringing millers into line as signatories of the marketing agreement would seem to depend on the number of producers cooperating in the reduction program through such contracts. It does not appear from the plan as outlined that non-cooperating producers dealing with non-cooperating millers are at any disadvantage as against cooperating producers dealing with cooperating dealers. On the contrary they may be paid the entire price of their product at once whereas the cooperating producer must wait for the payment of 40% of the selling price, less the expense of administering the trust fund. In the absence of a clear showing that the proposed provision is reasonably related to the purpose of crop reduction, we cannot now express a final opinion upon its validity. Assuming such relation to exist, but only upon such an assumption, we would be of the opinion that it is within the discretion of the Secretary to include such a provision in a Price Reduction Contract.

There remains the question whether the use of the proposed provision would constitute a violation of the antitrust laws. It may be assumed, for purposes of discussion, that an agreement not to sell to a certain class of persons, if entered into between private persons, would constitute a violation of the antitrust acts, provided the necessary interstate commerce aspect appeared in the transaction. Whether the antitrust acts apply to the agents of the government in making contracts with private persons generally is a

question which seems not to have been determined. See 30 Op. Atty. Gen. 197, 204 (1913). Such determination, however, is not necessary in disposing of the present problem, which is governed by the principles laid down by the Attorney General in dealing with the validity of an agreement entered into by the United States Food Administration under the Food Control Act, fixing a maximum price of sugar, 31 Op. Atty. Gen. 378 (1919). Pointing out that the agreement was entered into with the government itself through one of its agencies, in this case the Food Administration, it was there stated (p.377):

"The validity of such an agreement, therefore, depends not upon whether it may be said to constitute a violation of the Sherman Act, but upon whether it bears a reasonable relation to the declared objects of the Food Control Act. Let the agreement be one with the Government through a duly authorized agency, let it have a reasonable relation to the declared objects of the Food Control Act, and it is at once removed from the purpose and operation of the Sherman Act and other statutes governing restraints of trade by private persons."

Somewhat later the succeeding Attorney General was called upon to pass upon the legality of a plan of the Industrial Board of the Department of Commerce to hold conferences with the leaders of basic industries to determine stabilizing prices in order to promote business recovery. The Attorney General was of the opinion that the plan, if carried out, would constitute a violation of the antitrust laws, for the reason that the Industrial Board, though a governmental agency, had not been created by statute and had not been clothed by Congress with any powers which would remove agreements made by it from the operation of the Sherman Act. 31 Op. Atty. Gen. 411 (1919). Referring to the earlier opinion, he said (p.417):

"The real basis of these opinions, it will be noted, is that the agreements under consideration were found to be specifically authorized by section 2 of the Food Control Act. The Food Control Act being the later act it follows that to the extent that its provisions were inconsistent with the provisions of the Sherman Act, it operated to repeal or supersede the latter * * *."

Applying these principles to the present proposal, the fact that it contemplates an agreement in restraint of trade will not impair its validity provided the agreement itself is one into which the Secretary is authorized to enter under Section 8 (1). Being the later legislation, the Agricultural Adjustment Act must be deemed to supersede the antitrust acts to the extent necessary to give effect to its provisions. Contracts with producers under Section 8 (1) are designed primarily to provide "for reduction in the

acreage or reduction in the production for market" of basic agricultural commodities, It is inherent in such agreements under Section 8 (1) that they should operate to restrain trade, in at least the immediate sense of that term, by keeping products from the market. Even though repeals by implication are not favored, no doubt can be entertained that such agreements authorized under Section 8 (1) cannot be limited to those consistent with the antitrust acts, because the probable effect of such limitation would be to nullify Section 8 (1) in its essential provisions. But, under the principles laid down by the Attorney General, even though Section 8 (1) constitutes a repeal of the antitrust laws so far as its provisions are inconsistent with those of the earlier acts, the proposed provision is not removed from the scope of their prohibitions unless it bears a "reasonable relation to the declared objects" of Section 8 (1). This relation, as heretofore pointed out, has not yet been made manifest, and it is only upon the assumption that it can be adequately demonstrated to exist that we advise you that the provision in question constitutes no violation of the antitrust laws.

Attention may be directed to the fact that Section 8 (2) provides specifically that marketing agreements entered into under such section shall not be deemed to be in violation of any of the antitrust laws of the United States, and it may be argued that this specific provision indicates that other agreements under the Act were not intended to be exempt from the application of the antitrust laws. The argument is not persuasive because, as has been stated, the contracts contemplated by the express provisions of Section 8 (1) are of such a nature that a repeal pro tanto of the antitrust laws must necessarily be implied in order to validate such contracts, and to give effect to the express provisions of Section 8 (1). The inconsistency between Section 8 (1) and the antitrust laws is so clear that the express inclusion of an exemption from them in Section 8 (2) cannot be taken to negative an implied pro tanto repeal by Section 8 (1). In addition, it may be noted that the legislative history shows that the safeguarding clause in Section 8 (2) was added by amendment in the Senate, not because of a desire to give to the agreements therein authorized an immunity not accorded those authorized by Section 8 (1) and not even because it was considered necessary to provide specifically for exemption, but in order to relieve any hesitation which might be felt by processors in entering into marketing agreements on the ground that they might thereby expose themselves to prosecution. 77 Cong. Rec. 1981. As stated by Mr. Bankhead:

MR. BANKHEAD:

"That has been my view of it; but, as I said, in the preliminary discussion between the representatives of the department and of the processors it developed that while they are willing

to enter into these agreements, which are, of course, for the advantage of the producer, at least one or more of them stated that they believed such agreements would not be lawfully permitted. I take it that it would be a most unusual situation to authorize agreements with the Government itself, invite processors to enter into those agreements in order to carry out the provisions of the bill, without even allowing an excise tax, without giving those who enter into the agreements unquestioned and undoubted immunity from prosecution in carrying out the agreements made with the agents of the Government itself.

"If it is necessary to make the point absolutely clear, so as to remove objections made by attorneys who have given contrary advice, it seems to me we might as well either repeal the provision or make it perfectly clear that those who enter into these agreements at the solicitation of the Government will have perfect and absolute immunity, in carrying out their agreements with the Government, both from prosecution and from individual suits for violating the Sherman antitrust law."

This opinion assumes the validity of the marketing agreement, &c. As an original proposition the legality of that agreement would seem to us at least doubtful, and our opinion to that effect was given orally at the time this program was contemplated.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 57

MARKETING AGREEMENTS WITH PRODUCERS

By the terms of Section 8(2) of the Agricultural Adjustment Act, as amended, the Secretary may enter into marketing agreements with individual producers; and a provision that the contracting producers shall not sell to millers not parties to such marketing agreement for millers as may be in effect, being reasonably designed to effectuate the policy of the Act, may be included in such agreement.

June 22, 1934

MEMORANDUM TO MR. BOLTON-SMITH

This is in response to your oral request for an opinion on the following:

QUESTION

May the Secretary enter into a marketing agreement with producers of rice in the Southern states by which such producers agree not to sell any rice except to millers who are parties to such marketing agreement for millers of Southern rice as may be in effect?

OPINION

By the terms of Section 8 (2) of the Agricultural Adjustment Act, as amended, the Secretary may enter into marketing agreements with individual producers; and a provision that the contracting producers will not sell to millers not parties to such marketing agreement for millers as may be in effect, being reasonably designed to effectuate the policy of the Act, may be included in such agreement.

Statement of Facts

Under the Marketing Agreement with Southern Rice Millers now in effect provision is made for a trust fund to be distributed to producers who cooperate in a crop reduction program. Under the marketing agreement millers agree to pay a certain set price for rice purchased, as such payment to be made, 60 percent to producer, and 40 percent to the Secretary. The amount paid to the Secretary is to constitute the trust fund. The object of the proposed insert, in a marketing agreement, to be entered into with producers, is to induce millers to become signatories to the Marketing Agreement with Southern Rice Millers and thus assure payments into the trust fund to compensate producers cooperating in the reduction program.

Discussion

By Section 8(2) of the Agricultural Adjustment Act as amended by the Act of April 7, 1934, the Secretary is authorized

"*** to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce." (Italics supplied).

It thus appears that the Secretary is authorized to enter into marketing agreements with producers engaged in the handling of any agricultural commodity or product thereof within the limits defined.

Such marketing agreements are subject to no limitations or conditions except that due notice and opportunity for hearing are required and the Secretary is empowered to enter into them only "in order to effectuate the declared policy" of the Act. It is specifically provided that "the making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be lawful." It can therefore be no objection to a provision in such a marketing agreement that it may operate in restraint of trade. I should, therefore, conclude that it is possible to justify such a provision as that which it is proposed to include in a Marketing Agreement with the Southern Rice Producers. However, such a justification must depend upon an adequate showing that it will tend to effectuate the declared policy of the Act. It is impossible to give an opinion as to the probable effectiveness of the provisions in question for accomplishing this purpose without a full record on the economic facts.

There is a further question which must be raised. Section 8 (2) authorizes only "agreements with * * * producers * * * engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce". This may limit the numbers of producers who may be properly joined in such a Marketing Agreement and consequently curtail the effectiveness of such an agreement for the purpose intended. Again, with respect to this question, only upon a record of the facts can an adequate answer be given.

Francis M. Shen,
Chief of Brief and Opinion Section,
Office of the General Counsel.

No. 58

TERMINATION OF MARKETING AGREEMENT

PROVIDING FOR A TRUST FUND

If the Marketing Agreement for the California Rice Industry, or Article IX thereof providing for trust fund payments to producers participating in the crop control program, is immediately terminated, producers, unless assenting to a rescission of Article IX or to a substitute agreement, may have a right of action which can be sustained against the millers.

June 22, 1934.

MEMORANDUM TO MR. CHARLES B. HOWE, ACTING CHIEF OF RICE SECTION

In reply to your memorandum of May 26th, it is not necessary for present purposes to examine exhaustively the effect of the immediate termination of the Marketing Agreement for the California Rice Industry, or Article IX thereof, upon the rights of the growers, and the various legal theories upon which a cause of action could be thereupon sustained against various parties. A preliminary analysis suffices to support the conclusion that the growers who have cooperated in the crop control program have acquired such an interest in completion of performance under the program that the Agreement cannot safely be terminated unless their consent is secured to some substitute arrangement. I therefore submit my opinion as follows:

QUESTION

If the Marketing Agreement for the California Rice Industry, or Article IX thereof providing for trust fund payments to producers participating in a crop control program, is immediately terminated, will producers who have reduced their plantings in accordance with the program, have a right of action against any of the parties to the Marketing Agreement?

OPINION

Producers, unless assenting to a rescission of Article IX or a substitute agreement may have a right of action which can be sustained against the millers.

Statement of Facts

The Marketing Agreement for the Southern California Rice Industry, as stated on page 14 of the Agreement itself, is "a Marketing Agreement between the Secretary and persons engaged in the growing, milling and marketing of rice in the State of California,"

and was entered into by the Secretary under authority conferred upon him by Section 8 (2) of the Agricultural Adjustment Act. For convenience in this memorandum, the signatories to the Agreement, other than the Secretary, will be called "millers." The Agreement, or contract, contains no words of promise on the part of the Secretary who binds himself to no acts of performance. It may be stated here, however, that consideration to the millers may undoubtedly be found in the immunity from the application of the antitrust laws which is provided in Section 8 (2) for agreements of this character, to which the Secretary is a party.

On the part of the millers, although the Agreement is not couched in promissory terms, definite obligations are undertaken. Those now in question are set forth in Article IX under the heading of "Crop Control," and certain of them have already been performed. Paragraph 1 provides that the Crop Board shall invite "producers who desire to participate in a crop control program" to submit records of past production before January 1. This was done and records were submitted by the producers. Paragraph 2 provides that the Board shall determine whether a crop control program shall be operative in a given year. In accordance with the terms of this paragraph, producers desiring to cooperate were called upon to file statements of Intention to Plant and Not to Plant. On the basis of these, and still pursuant to the terms of Paragraph 2, the Crop Board, upon finding that the estimated crop would exceed 3,000,000 bags, declared, with the approval of the Secretary, that a crop control program would be operative. Following a procedure provided in paragraphs 3 and 4, the Crop Board thereupon notified each grower of his "assignment of production units" based on a percentage of his past average production. At the same time the Crop Board furnished to the grower a form entitled "Amendment to Statement of Intention to Plant and/or Not to Plant," indicating "the maximum acreage to be planted" based upon the assigned production units. This was signed by the cooperating producers and filed with the Crop Board which then issued to them "certificates," acknowledging the filing of "an acceptable Declaration of Intention to Plant Rice in accord with the 1934 Crop Control Program." The 1934 planting season is about at its close, and producers have presumably limited their plantings to the amount indicated in the amended Statements of Intention to Plant.

Article IX further provides for a Producers' Trust Fund to be set up by deducting a certain percentage of the amount payable to the producers by the millers for rice marketed, this percentage to be paid into the Fund. By the terms of this Agreement producers selling rice prior

to September 30 are to be issued certificates representing Trust Fund Units for rice sold within the production units assigned to them, and, similarly, producers taking land out of production, in accordance with the program, are to receive certificates for Trust Fund Units. Paragraph 6 (b) provides that, on determination of the value of each trust fund unit, the Crop Board shall cause the trustee to pay the owners of the Trust Fund Units amounts equal to the value thereof. Neither the trustee nor the depositories provided for by the Agreement have yet been selected, and no moneys have been paid into the Producers' Trust Fund.

The Crop Board is a body of eight members selected as provided by Article II of the Marketing Agreement, and representing various associations of growers. Article II, paragraph 1, provides that "this agreement shall be administered by a Marketing Board and as to certain specified matters by a Crop Board."

Discussion

(1)

The Marketing Agreement, in providing for payments to producers, is a contract for the benefit of third parties subject to a condition precedent, now satisfied.

On the above state of facts there is little likelihood of a cause of action existing against the contracting millers or the Crop Board on the basis of a trust. No res exists to serve as the corpus of a trust, there has been no setting aside of credit, and no money or thing of value has come into the hands of the millers or the Crop Board to create a relation of a fiduciary character as to its application and use. Such rights as the producers may possess at this state are to be most strongly argued upon the agreement and the subsequent dealings between the Crop Board and the producers.

That the obligations undertaken in Article IX are for the benefit of producers cooperating in the crop control program is clear. The deductions to be made by the millers from the producer's prices currently payable are to be paid into a trust fund, the entire amount of which, after deducting the expense of the Crop Control Program, is to be paid to the owners of certificates of Trust Fund Units, originally issued only to cooperating producers. Under the terms of the Agreement, there is an implied condition precedent to the duty of the Crop Board, as agent, to set up the trust fund machinery and to the duty of the millers to make deductions from

the price payable for rice purchased. Unless a crop control program is determined upon, there is no basis upon which the trust fund plan can operate. Paragraph 3 provides that "if a crop control program shall be declared operative," the Crop Board shall assign production units to the cooperating producers. Thereafter, the provisions relating to the operation of the trust fund plan are subject to no condition or contingency and become applicable as soon as the marketing season begins.

The situation now existing, therefore, is that there is a contract for the benefit of third parties subject to a condition precedent which has been satisfied, and that the third parties, now an ascertained group, have acted in reliance upon that agreement in a manner which has materially altered their position.

(2)

Under such circumstances, the producers, as third party beneficiaries, would have in most jurisdictions a direct cause of action upon the agreement.

The objection which has been recognized in permitting a third party, for whose benefit a contract is made, from maintaining an action upon it is the lack of privity between him and the promisor in the making of the contract. The doctrine, however, which denied him the right to bring an action has been rejected, in whole or in part, in most jurisdictions in this country, and by the weight of authority the same facts that operate to create contractual relations between the parties may operate to create rights in a third person, and neither a specific res nor the element of unjust enrichment is necessary for this result. See Corvin's Anson on Contracts (5th ed.), sections 284, 286.

In some jurisdictions the right of the third party is recognized as a legal and contractual right which arises immediately upon the execution of the contract and is independent of any act of reliance or assent by the third party, who may be a donee or beneficiary only. In others, including New York, it is said that there must be some "legal or equitable duty" owed to the third person by the promisee. Even under the stricter requirements of this doctrine, it is not impossible to find in the present case a "legal or equitable duty" of the promisee, the Secretary of Agriculture, to the third party beneficiaries, the cooperation producers. Under the Agricultural Adjustment Act, powers, and with them unquestionably a duty, are conferred upon the Secretary to effectuate the policy of the Act. Provision is made for bene-

fit payments to producers cooperating in reduction programs. The Agreement thus represents the selection of a particular means of discharging a duty to producers. It is no longer necessary, under the New York doctrine, that the duty owed the beneficiary be one susceptible of precise measurement, such as the payment of a debt, or that it should be one on which the beneficiary could sustain an action against the promisee, Little v. Banks, 85 N.Y. 258 (1881); Pond v. New Rochelle, 183 N.Y. 330 (1906). A general duty owed by a public body or officer to a citizen appears to be sufficient. Also, it appears that the standard which requires some duty relationship may be only another way of insisting upon the element of privity, which can be supplied after the execution of the contract. Thus, in Gifford v. Corrigan, 117 N.Y. 257, 22 N.E. 756 (1889), upholding the right of a mortgagee to maintain an action upon the agreement of a grantee to assume the mortgage of the grantor, after the mortgagee had adopted the agreement as one made for his benefit, the mortgagee by his conduct is said "to bring himself into privity with it," so that the action, while based upon equitable considerations, is an action at law.

But, whenever the theory on which the courts in a particular jurisdiction proceed, when, as in the present case the third party beneficiaries have accepted and so acted in reliance upon the contract as to materially change their position, the parties are no longer free to rescind.

(3)

It may be reasonably argued that termination of the Marketing Agreement or Article IX, without the consent of the cooperating producers, will not destroy their rights based upon acts done prior thereto.

The agreement contains the following provisions for termination. Article XIII 7 (1) (a) provides that the Secretary may

"At any time terminate this agreement by notice in writing deposited in the registered mails and addressed to the Marketing Board at its address on file with the Secretary and the Secretary may at any time terminate Article IX hereof in the same manner without terminating any provisions or conditions hereof."

It may be conceded that the power of the Secretary to terminate the Marketing Agreement thus provided is not subject to diminution by reason of any action upon the part of the producers. Parties to the Marketing Agreement and others interested in its performance must be deemed to act with reference to its terms. A specific provision authorizing the Secretary to terminate and cut off all existing rights could not therefore be limited by action of interested parties in reliance upon the expectation of advantages to accrue upon full performance. However, by the terms of the Marketing Agreement, the powers of the Secretary to terminate are not absolute, or, more precisely, a termination by the Secretary does not cut off all existing rights.

Article XIII 7 (3) provides

"The benefits, privileges and immunities conferred by virtue of this Agreement, shall cease upon its termination, except with respect to acts done prior thereto; and the benefits, privileges and immunities conferred by virtue of this Agreement upon any party signatory hereto shall cease at its termination as to such party, except with respect to acts done prior thereto." (Article XIII 7 (3).)

The foregoing provision is not by its terms limited to protecting parties signatory to the Marketing Agreement in the privileges and benefits which accrued to them by reason of performance prior to the date of termination. It is suggested that the reason for this provision was to insure the millers against prosecution for violation of the anti-trust laws after termination of the Agreement because of action taken while the Agreement was in effect or because of unavoidable extension of that action subsequent to termination. However, the terms of the section do not require such narrow construction and it is at least possible that more extensive meaning may be given it. It is submitted that the provision might reasonably be interpreted to mean that producers interested in the Marketing Agreement were not, by termination, to be deprived of the benefits for which they have given full performance by acts done prior to termination. If this interpretation be given the paragraph in question, then the Secretary is without right to put an end to the obligations of the millers to pay specified amounts into the trust fund for disbursement to cooperating producers. It is not urged that this is the only interpretation, but the possibility of it as a reasonable one affords such a danger of successful action against the millers that termination without consent of the cooperating producers would seem to be improvident.

It is therefore my opinion that the Marketing Agreement in question should not be terminated without securing a release of such obligations as may have accrued in favor of the cooperating producers. I see no legal difficulty in gaining such release by securing consent of the producers to a substitute arrangement. If, for instance, the Secretary initiates a reduction program, according to the usual procedure which we have hitherto employed, a provision in the Agreement with the Secretary for reduction in production by which cooperating producers accept benefit payments in lieu of participation in the trust provided under the Marketing Agreement would adequately efface any claims against the millers.

Francis M. Shea,
Chief of Brief and Opinion Section
Office of the General Counsel

No. 59

PURCHASE OF CORN FOR DROUGHT RELIEF

PURPOSES

Under the Emergency Appropriation Act, Fiscal Year 1935, and a proposed Executive Order allocating funds to meet the emergency and necessity for relief in stricken agricultural areas, the Secretary of Agriculture, or such agencies as he may designate, may use the amounts allocated for the purpose of securing the release of corn for feed purposes in the stricken area, provided that the promises made to the owners of corn in such transactions are reasonably necessary to secure the release.

June 22, 1934

MEMORANDUM TO MR. CHRISTGAU

In response to your questions as to the legal problems involved in the proposed scheme to secure release of corn now standing as collateral for Commodity Credit Corporation loans, I submit my opinion as follows:

Statement of Facts

As I understand the factual situation, it is this: Due to drought in western areas there is a sharp demand for corn to be used for food purposes. It is necessary to obtain an immediately available supply of approximately forty million bushels. A large part of the supply of this corn is now cribbed under seal on the numerous farms, standing as collateral for Commodity Credit loans to the extent of 45¢ per bushel. The Commodity Credit Corporation has worked out arrangements permitting the sale of this corn prior to repayment of the loan in the following manner: The debtor advises Commodity Credit of his desire to sell the corn, specifying the number of bushels to be sold and the person who is to be the purchaser. Thereupon, the Commodity Credit Corporation forwards the documents representing their interest in the corn, the obligation of the debtor, etc., to a local bank with advice to surrender them upon payment of the amount of the loan together with carrying charges. The Commodity Credit Corporation also advises the purchaser of its lien and authorizes the sale of the corn to him upon condition that he pay the purchase price to the local bank specified. The debtor is also advised to sell and deliver to the named purchaser the corn in question on condition that the purchase price be paid to the specified bank, which is to deduct that amount necessary to satisfy the Commodity Credit Corporation's loan, together with interest and carrying charges and pay the overplus to the seller.

Despite this arrangement, however, when the Federal Emergency Relief Administration went into the market seeking to purchase corn for the purpose of meeting the needs of the drought area, the price shot up immediately at an alarming rate. The reason for this is explained as follows: the owner of the corn is cushioned against any loss which may result from a drop in the market price, because he already has a non-liability loan to the extent of 45¢ per bushel on the corn as collateral. In case the price drops below 45¢, he will

be required only to deliver the corn to the Commodity Credit Corporation. He also has had an immediate advance which enables him to finance himself for the present. Consequently, he is in a favorable position to speculate upon a rising market and where such a market is indicated is unlikely to sell until he believes the most favorable price has been reached. It is therefore asserted that it is necessary to induce him by some offer of consideration to release this sealed corn at the present time, so that the emergency in the drought area may be taken care of.

The proposed plan for inducing owners of corn to release it for feed purposes is as follows: An Agency of the Federal government (Probably either the Commodity Purchase Section of the Department of Agriculture or the Federal Emergency Relief Administration) will promise the owner of the corn that if he will sell at the present market price either to individuals in the drought area who desire to acquire it for feed purposes or to the Federal Emergency Relief Administration to be used in relief of the drought area, then such Federal Agency will pay to the owner of the corn the difference between the market price at which it was sold and the market price on any day between the date of sale and August 1, 1934 which the owner indicates as the day upon which he would have made sale of the corn had he not been induced to sell at the earlier time for the purpose of meeting the emergency; provided, however, that the liability of such Federal agency shall not exceed a certain specified amount per bushel. It is believed that such a promise will insure the owner of the corn as good a price as he could have gotten were he to hold it for a rising market and that this will be a sufficient inducement to secure a present release of forty million bushels, and that it is the minimum inducement which would provide such a release.

It has been contemplated that the Federal agency would insure against too severe a liability by hedging these promises on the exchange, i.e., by buying now part or the whole of the forty million bushels for delivery at various future dates staggered between the present and August 1, 1934. There are certain other phases of the plan such as provision for securing distribution by use of local elevators, which may possibly raise legal questions when presented in more detail but as outlined do not seem to present difficulties.

Discussion

It is my opinion that under "E. R. 9830, Title 2 -- Emergency Appropriations" and a proposed Executive Order allocating funds to meet the emergency and necessity for relief in stricken Agricultural areas, the Secretary of Agriculture or

such agency as he may designate may use the amounts allocated, for the purpose of securing release of corn for feed purposes in the stricken area, in the manner proposed, provided that the promises to the owner of such corn involved are reasonably necessary to secure the release. It is my further opinion that hedging operations can not be legally justified for the purpose of limiting this liability:

The pertinent provisions of H. R. 9830 read as follows:

"* * * the following sums are appropriated out of any money in the treasury not otherwise appropriated * * * to meet the emergency and necessity for relief in stricken agricultural areas, to remain available until June 30, 1935, \$525,000,000, to be allocated by the President to supplement the appropriations heretofore made for emergency purposes and in addition thereto for (1) making loans to farmers for, and/or (2) the purchase, sale, gift, or other disposition of, seed, feed, freight, summer following, and similar purposes; expenditures hereunder and the manner in which they shall be incurred, allowed, and paid, shall be determined by the President, and may include expenditures for personal services and rent in the District of Columbia and elsewhere and for printing and binding and may be made without regard to the provisions of section 3709 of the Revised Statutes."

The pertinent provision of the Executive Order allocating funds in accordance with the foregoing provision of H. R. 9830 is as follows:

"By virtue of, and pursuant to, the authority vested in me by the 'Emergency Appropriation Act, fiscal year 1935', appropriating \$525,000,000 to meet the emergency and necessity for relief in stricken agricultural areas, there is hereby allocated * * * to the Secretary of Agriculture or such agency as he may designate the sum of \$43,750,000 for the purchase, sale, gift, or other disposition of seed, feed, and livestock, and for transportation thereof."

The Secretary of Agriculture under the authority of the Act and the foregoing Executive Order is clearly authorized to designate an agency to make appropriate use of "the sum of \$43,750,000 for the purchase, sale, gift, or other disposition of seed, feed, and livestock, and for transportation thereof". He may appropriately designate an agency within or without the Department of Agriculture. Consequently,

either the Commodity Purchase Section or the Federal Emergency Relief Administration (the two agencies which have been discussed) might be selected. The Secretary or such agency is specifically authorized to expend the appropriated amount for making such disposition of feed as may be necessary or appropriate for the purpose of meeting the emergency and necessity for relief in stricken Agricultural areas. It is clear that there will be no difficulty in establishing the vital necessity of securing a release of forty million bushels of corn for feed purposes in the stricken area. It seems also to be evident that purchases of an adequate amount of such corn for the purposes specified can not be secured immediately without offering some inducement to the owners to sell in addition to the present market price. If there is reason to believe that the proposed method of securing the release of this corn will be effective and is reasonable with relation to the expenses which will be incurred by its use as compared with other methods which might be employed for the purpose, then I believe that the monies appropriated may be employed to accomplish the outlined scheme. The Secretary should have an adequate memorandum supporting the appropriateness of this method and the reasonableness of the expenses which will be incurred in its use before taking action to put it into effect.

The hedging operations which have been suggested, however, seem to me wholly unauthorized. In legal effect they would constitute an attempt on the part of the Government or Federal agency to insure against too extensive liability. There is no provision in the Section of the Statute above quoted which could be interpreted as authorizing the expenditure of funds for purposes of insuring the liability of the Government or of any of the specified Federal agencies. In point of fact "It has long been the policy of the United States not to insure its property, the theory being that the Government assumes its own risks. 13 Comp. Dec. 770; 23 Id. 377; 4 Comp. Gen. 690; 7 Id. 105." (Comp. Gen. A-50755, Aug. 31, 1933).

An examination of the powers of the Secretary and the powers of the agencies within the Department of Agriculture as well as Federal Emergency Relief Administration and Federal Surplus Relief Corporation give us no basis for an opinion that hedging operations are authorized. It is at least certain that the monies appropriated under F. R. 9830 can not be used for hedging purposes by an agency designated to employ these funds for emergency relief in stricken Agricultural areas nor have we been able to find any appropriation which might be made use of by the agencies above specified for the purpose of conducting these hedging operations.

By the terms of the contract the extent of the Federal agency's liability may be limited and should be limited to the appropriation made and allocated.

Only the major legal issues have been dealt with in this memorandum. In working out the details of the program there will undoubtedly be numerous other legal questions presented, but it is believed that there is no serious obstacle to effectuating this program provided appropriate procedures are followed.

Francis M. Shea,
Chief of Brief and Opinion Section,
Office of the General Counsel.

No. 60

CONTRACT BY GOVERNMENT AGENT IN
EXCESS OF AUTHORITY

The United States is not obligated to pay a claim arising upon a contract allegedly, but not actually, within the authorization of the Marketing Agreement for the Disposal of the North Pacific Wheat Surplus; nor may the Secretary ratify the unauthorized contract and make payment on the basis of the ratification.

Opinion Section Memorandum No. 97
Dated June 23, 1934.

June 23, 1934.

MEMORANDUM TO MR. FRANK

Pursuant to your request, I submit herewith an opinion upon the validity of the claim of Louis Dreyfus & Co., Portland, Oregon, for \$5,014.32, representing the differential on the purchase and sale of 18,572.35 bushels of smoke odor wheat, the transaction allegedly being carried out pursuant to the Marketing Agreement for the Disposal of North Pacific Wheat Surplus.

OPINION

The purchase of the smoke odor wheat was not authorized by the Agreement, and therefore the Government is not obligated to pay the claim. Nor may the Secretary ratify the unauthorized contract and make payment on the basis of the ratification.

STATEMENT OF FACTS

From the available information, it appears that Louis Dreyfus & Co., Portland, Oregon, purchased for the account of the North Pacific Emergency Export Association 18,572.35 bushels of smoke odor wheat at the purchase price of 62 1/2¢ per bushel, basis f.o.b. Before the wheat was purchased for the account of the Association it had been stored in a warehouse which was destroyed by fire. The wheat was so damaged in the fire that it could not be mixed with any other wheat for the purpose of making a grade No. 2 or better quality. Indicative of the low quality is the fact that the outgoing inspection certificate attached to the voucher read: "Sample Grade Western White, Distinctly Low Quality (Fire Burnt Odor)." Mr. Waylor stated in his memorandum to Mr. Payne that the wheat could not be milled for flour, but was only fit for feed. In purchasing the wheat, Louis Dreyfus & Co. acted pursuant to the directions of the Association which was in turn acting under the instructions of the duly designated agent of the Secretary of Agriculture, Douglas McIntyre. The transaction was carried out allegedly under the authorization of Section 4 of the Marketing Agreement for the Disposal of the North Pacific Wheat Surplus. This section provides that the Secretary of Agriculture may, from time to time, give written instructions to the Association directing it to contract for the purchase of wheat for sale in the export trade or to any public unemployment relief agency.

The marketing agreement further provides by Section 5 thereof that, with respect to the wheat purchased under Section 4, the Association shall receive written bids from its members, each day, for the purchase from the Association and the sale in the export trade of any part of such wheat in the form of wheat or flour. The Secretary of Agriculture, or his duly designated agent, is to inspect the bids and specify the ones to be accepted by the Association. Under the marketing agreement, the Association agrees to transfer contracts for a sufficient amount of wheat purchased pursuant to Section 4 to permit the individual members to carry out their bids which have been accepted by the Association, and the members agree to pay the purchase price for the contracts so transferred pursuant to the terms of such contracts. Assertedly acting under the sanction of Section 5, the Association on the instruction of Douglas McIntyre, the agent of the Secretary of Agriculture, accepted the bid of Louis Dreyfus & Co. for the purchase from the Association of the 18,572.35 bushels of smoke odor wheat for sale in the export trade. The sales price specified in the bid was 38 1/2¢ per bushel. The Association at the same time, assigned to Louis Dreyfus & Co. the purchase contract for the 18,572.35 bushels of smoke odor wheat and the amount due thereunder has been paid by the Company.

There is now before the Audit Division the claim of Louis Dreyfus & Co. for \$5,014.32 covering the differential between the purchase price which it paid for the contracted wheat (this being the payment made under the assigned contract) and the net sales price received in connection with the sale of the wheat (this being the price specified in the bid less costs incurred in the handling of the wheat). The claim is based on Sections 8 and 9 of the marketing agreement which provide that the Secretary of Agriculture is to pay to the Association, for the wheat sold pursuant to Section 5, an amount equal to the difference between the purchase price and the net sales price, which money is to be paid by the Association to the members to whom the contracted wheat has been transferred by the Association.

The validity of the claim of Louis Dreyfus & Co. is now subject to inquiry because the purchase and sales contracts involve smoke odor wheat of a distinctly low quality. Question has been raised as to whether the marketing Agreement authorizes the purchase and sale of wheat of this quality. It is contended that the agent of the Secretary of Agriculture acted beyond the scope of his authority in instructing the Association to purchase the smoke odor wheat and in approving the sale of such wheat, and that therefore the Secretary of Agriculture (or the Government whom he represents) is not liable to the Association acting pursuant to such instructions or to Louis Dreyfus & Co. This contention rests on the theory that Sections 8 and 9 of the marketing agreement are applicable only where the purchase and sale of wheat has been strictly according to Sections 4 and 5.

1. The official representative of the Secretary, Douglas McIntyre apparently acted beyond the scope of his authority in directing the purchase and approving the sale of the smoke odor wheat.

Mr. McIntyre derives his powers from the delegation of authority, dated October 10, 1933, the relevant paragraphs 6 & 7 delegating the following powers to him:

"6. To give written instructions to the Executive Committee and the Managing Agent pursuant to the provisions of Section 4 of such marketing agreement.

"7. To give written instructions to the Executive Committee and the Managing Agent with respect to the bids to be accepted as provided for in Section 5 of the marketing agreement. Furthermore, to give written instructions to the Executive Committee and the Managing Agent pursuant to the provisions of Section 5 of the Marketing Agreement."

The same delegation of authority specifically provides that Mr. McIntyre will "perform the above functions pursuant to the aforesaid marketing agreement within the limitations and for the purposes therein described."

The powers of the Secretary's agent are thus restricted by any limitations contained in Sections 4 and 5 of the marketing agreement. Section 4 provides that the Secretary may in his discretion give written instructions regarding the quantity of wheat to be purchased, which purchases shall be on the basis set forth in Exhibit A. Exhibit A provides that the purchase price shall be basis No. 1 federal grades, sacked, delivered on track at tidewater terminal markets with specified discounts for other grades, including discounts for dockage, excess moisture, treated wheat and sample grade musty, sour and heat damaged wheat. Exhibit A, however, makes no provision for sample grade smoke odor wheat. The contention can thus be made that the marketing agreement does not contemplate the purchase of this type of wheat. The failure of exhibit A to provide for smoke odor wheat or to make a general provision relating to wheat not specifically provided for therein lends color to such interpretation, especially in view of the minuteness with which the discount provisions are set forth. The interpretation placed upon Section 4 is important inasmuch as Section 5, relating to sale contracts, provides for the sale of wheat purchased pursuant to Section 4. The Government, as will be pointed out subsequently, agrees to pay the Association only in the event that sales are made pursuant to Section 5. Thus, the Government assumes liability only in the event that the terms of both Section 4 and 5 are fulfilled.

Section 5. provides that "The sales of wheat, if any, shall be made on the basis of No. 2 bulk, f.o.b. ship." The exact meaning of the quoted words is open to some question. Mr. Naylor and Mr. Payne appear to interpret the words as meaning that a wheat of such low quality as cannot be mixed with other wheat so as to make a wheat of grade No. 2 or better quality cannot be sold in export. On the other hand, Mr. McIntyre declares "the word 'basis' presumably was used advisedly in order that other grades may be exported either at a premium or discount according to the official grading of the Federal Inspectors." In support of the first interpretation, the general trade practice of shipping only No. 2 wheat may be cited. Moreover, persuasive to this construction is the provision of Exhibit C relating to the "Schedule of conversion of flour prices to wheat prices, basis No. 2 or better, F.O.B. track at mill terminal basis." On the other hand, stipulation is made under the discount provisions of Exhibit A that musty, sour and heat damaged wheat may be purchased and clearly certain wheat of this type is of such nature that it cannot be mixed with other wheat to produce a grade No. 2 or better quality. If wheat may be purchased by the Association, the marketing agreement surely contemplated its sale. Nevertheless, it may be validly argued that the words "the sales of wheat, if any, shall be made on the basis of No. 2 bulk, f. o. b. ship" serve as a limitation on the discount provisions of Exhibit A, so that only such musty, sour and heat damaged wheat as can be mixed with other wheat so as to produce a grade No. 2 may be purchased.

Since the smoke odor wheat could not be mixed with other wheat so as to produce a grade No. 2. the interpretation placed upon the questioned words of Section 5 is important in determining the authority of the representative of the Secretary of Agriculture to instruct the Association to purchase the wheat. Although either of the two suggested interpretations appears possible, it is believed that a strict, literal interpretation of Section 5 is more conducive to the conclusion that it does not authorize the purchase of the low quality smoke odor wheat. This conclusion supports the opinion already expressed that Section 4 does not permit the representative of the Secretary to direct the Association to purchase such wheat.

2. If the Secretary's representative acted beyond the scope of his authority, the Government is not liable either to the Association or to Louis Dreyfus & Co.

The Government, through the Secretary of Agriculture, assumes liability for the payment of differentials under the marketing agreement by Section 8 thereof. This section provides:

"Sec. 8. The Association shall, if any part of the wheat purchased is sold as either wheat and/or flour, pursuant to Section 5 hereof, present to the Secretary a verified statement, on forms to be supplied by the Secretary

showing the Purchase Price of such wheat, the Sales Price and the Net Sales Price for such wheat and/or flour. The Secretary agrees to pay to the Association within a reasonable time of the receipt of such statement and other documents which shall indicate to the satisfaction of the Secretary that such wheat and/or flour has been exported, or otherwise disposed of pursuant to Section 5 hereof an amount equal to the difference between the Purchase Price and the Net Sales Price."

Furthermore, Section 9 provides that as to the funds thus received, the Association is to pay to those members to whom contracted wheat has been transferred by the Association, pursuant to Section 5, an amount equal to the difference between the purchase price which such members have paid for the contracted wheat and the net sales price received in connection with the sale of such wheat in the form of wheat or flour.

Thus, if the Secretary of Agriculture fails to make payment to the Association pursuant to the marketing agreement, either the Association or the member to whom payment is due appears to have a valid claim against the Government. The marketing agreement expressly states, however, that the Secretary is to pay the amount of the differential where the wheat is exported pursuant to Section 5. If the Association has no power under Section 5 to sell the smoke odor wheat, there is thus no basis on which the liability of the Government can be predicated unless it is estopped by reason of the acts of the Secretary's representative, Douglas McIntyre.

It is a well-settled rule that the Government is not responsible for the acts of its agents acting beyond the scope of their authority. Whiteside v. United States, 93 U. S. 247 (1876); Stansbury v. United States, 75 U. S. 33 (1868); Pine River Logging Co. v. United States, 186 U. S. 279 (1902). The reason for the rule is thus stated in Whiteside v. United States, supra, at page 257:

"Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better than an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public. Mayor v. Eschback, 17 Md. 282."

Even under such circumstances as to create an apparent authority which would estop the ordinary principal from denying the act of this agent, the Government is not bound. Hawkins v. United States, 96 U. S. 689 (1877). The government is therefore not estopped to deny its liability on any claims presented by the Association and Louis Dreyfus & Co.

3. Possibility of ratification by the Secretary of Agriculture of the acts of Douglas McIntyre and the North Pacific Emergency Export Association.

Although Douglas McIntyre, the agent of the Secretary of Agriculture, and the North Pacific Emergency Export Association apparently went beyond the scope of their authority under the marketing agreements in authorizing the purchase and sale of the low grade smoke odor wheat and thus freed the Government from liability in connection therewith, it may be administratively desirable for the Government to pay the claim. Thus, attention is here directed to the possibility of ratification by the Secretary of Agriculture of the ultra vires acts.

Section 12 (b) of the Agricultural Adjustment Act provides that the proceeds from the processing taxes are appropriated to be available, in part, to the Secretary of Agriculture for the removal of surplus agricultural products. He may also delegate to others the power to exercise the functions vested in him, and therefore a grant of power to Douglas McIntyre and to the Association to contract for the removal of the low quality smoke odor wheat would have been valid. This suggests the possibility that the Secretary of Agriculture may ratify the acts of Douglas McIntyre and the Association in so contracting.

It is my opinion that the Secretary cannot ratify the unauthorized contract. It is true that he could have authorized the contract in the first instance, and that, consequently, were the contract in question one between private parties, ratification by the principal would validate the contract ab initio. But the Secretary is not in his capacity as such a private person. He may ratify only if authority can be found for the act of ratification. This authority can be found nowhere unless in Section 12 (b) of the Agricultural Adjustment Act, which makes the proceeds of processing taxes available to the Secretary for the removal of surplus agricultural products. But in this case removal of the smoke odor wheat has already been accomplished and there is no existing contractual obligation of the United States arising out of the removal. Ratification cannot, then, be said to assist in the removal of products which have already been removed, and would constitute merely a grant of money to Louis Dreyfus & Co. to relieve it from possible hardship resulting from the unauthorized act of the Government's agent. It may be urged that such payment would be conducive to friendly relations with the Dreyfus Company, and would tend to induce them to remove more surplus grain pursuant to the Marketing Agreement, and, further, that it would enhance the Government's reputation for generous business conduct. But such an argument would seem to strain the meaning of "removal of surplus agricultural products" beyond the breaking point. It cannot be seriously contended that this phrase justifies employment of a technique so indirect as the cultivation of good will toward the Government by paying claims of persons who have been embarrassed or inconvenienced by the unauthorized acts of government agents.

It is my conclusion, therefore, that the Secretary may not ratify the contract for the purchase of smoke odor wheat, and that Louis Dreyfus & Co. must look to Congress for any relief moving from the United States.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of The General Counsel.

No. 61

AGRICULTURAL ADJUSTMENT ACT AND AMENDATORY
MEASURES AS REVENUE LEGISLATION

A bill originating in the Senate to amend the Agricultural Adjustment Act and which purports to alter the basis for calculating the amount of taxes to be imposed pursuant to the Agricultural Adjustment Act, is of doubtful constitutionality in view of Article I, Section 7 of the Constitution which provides that "all bills for raising revenue shall originate in the House of Representatives."

Opinion Section Memorandum No. 178
Dated June 23, 1934.

June 23, 1934.

Hon. Henry A. Wallace,
Secretary of Agriculture.

Dear Mr. Secretary:

There has been referred to me for consideration bill S. 3185, entitled "An Act to amend the Agricultural Adjustment Act, as amended, with respect to farm prices", in connection with which the President has requested that you advise him immediately whether there is any objection to its approval. In my opinion there is a serious objection to the approval of the bill, in that there is grave question whether the bill, since it originated in the Senate, and since it purports to alter the basis for calculating the amount of taxes imposed pursuant to the Agricultural Adjustment Act, is constitutional in view of Article I, Section 7 of the Constitution, which provides that:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."

I. The Agricultural Adjustment Act is a Revenue Act.

The declared purpose and express provisions of the Agricultural Adjustment Act are such as to leave little doubt but that the Act must be regarded and construed as a revenue statute, and that it was, before its approval, a "bill for raising revenue" within the meaning of Article I of Section 7 of the Constitution. The purposes of the Act as set forth in its title are;

"To relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes." (Underscoring supplied)

Section 9(a) of the Act declares that: "To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided."

Other parts of this Section state the periods during which processing taxes shall be in effect, set forth the method for computing the rate of the tax, and define the term "processing" with respect to the different basic commodities.

Sections 15 and 16 impose certain other taxes. Section 12(b) appropriates the proceeds of the taxes to certain designated purposes under the Act. Section 19 (a) provides that the taxes imposed by the Agricultural Adjustment Act shall be collected by the Bureau of Internal Revenue and paid into the Treasury of the United States. By Section 19 (b), certain provisions and penalties applicable with respect to taxes imposed by Section 600 of the Revenue Act of 1926 and Section 626 of the Revenue Act of 1932 are made applicable to taxes imposed under the Agricultural Adjustment Act. Section 20 punishes certain false statements concerning the amount of taxes imposed by the Act.

That the tax provisions were inserted by Congress with the bona fide intention of raising revenue is clear from the legislative history of the measure. In Report No. 6 of the Committee on Agriculture of the House of Representatives (73rd Congress, First Session), it is said at Page 3:

"The bill, however, makes provision for raising additional revenues for the Treasury that it is believed will more than equal any expenditures resulting from operation of the Act. Such revenues will be obtained, in the main, from manufacturers' excise or processing taxes subsequently discussed."

The foregoing summary of the fiscal provisions of the Agricultural Adjustment Act, considered in conjunction with its other provisions, must make it apparent that, while raising revenue is not the sole purpose of the Act, it is, none the less, one of its principal objectives. This fact is recognized in the entitling of the Act. The provisions for benefit and rental payments for reduction of acreage and production can not stand apart from the tax provisions. The provisions for reduction of surplus and expansion of markets depend for their effectiveness upon the appropriation of the proceeds of the tax. Thus, the tax is not purely incidental to other objects of the statute; it is part of the heart and center of the whole scheme and structure.

In *Hubbard vs. Lowe*, 226 Fed. 135 (S.D. N.Y. 1915), the late Judge Hough was called upon to consider the constitutionality of the first Cotton Futures Act (38 Stat. 693). This Act imposed a tax of two cents (2¢) per pound upon contracts for the sale of cotton for future delivery, but excepted from the tax future contracts which conformed to certain requirements set forth in the Act, which requirements mainly concerned the method of computing differences in price for various grades of cotton. In holding this Act unconstitutional on the ground that it had originated in the Senate, Judge Hough said:

"I am perhaps saved from inquiry whether the Cotton Futures Act is a 'bill for raising revenue' by the agreement of counsel on this point. They have all asserted that, though every one who has studied the investigations, reports, and discussions preceding and producing the passage of

the act knows that nothing was further from the intent or desire of the lawmakers than the production of revenue; nevertheless the result of their efforts is a revenue bill within the constitutional meaning.

"This familiar paradox results from *McCray v. United States*, 195 U. S. 27, 59, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561, and the doctrine that the motive or purpose of Congress in adopting a statute cannot be judicially inquired into. As in the case cited the Legislature desired to suppress the sale of colored oleomargarine, so here it desired to destroy every form of contract for future delivery of cotton, except that marked out by the statute. In both instances the object was sought to be attained by a tax intended to be prohibitive; in both the statutes are by title called tax bills, and to both the same treatment must be accorded, viz: They are revenue bills, because Congress gives them that label and provides the machinery of levy and collection. It is immaterial what was the intent behind the statute; it is enough that the tax was laid, and the probability or desirability of collecting any taxes is beside the issue."

* * *

"* * *the remaining question is this: When the Congress, through its proper officials, certifies that it has gone through the forms of lawmaking in violation of an express constitutional mandate, is the result a law at all? Of course it is not; the question answers itself, unless there be some different treatment due to an act created in a fundamentally illegal manner and that accorded to one created for an unconstitutional purpose.

"There can be no such difference logically. Any and all violations of constitutional requirements vitiate a statute, and it has been so held in three states. *Succession of Givanovich*, 50 La. Ann., Pt. I, 625, 24 South. 679; *Succession of Sala*, 50 La. Ann., Pt. II, 1018, 24 South. 674; *Perry Co. v. Selma, etc., R.R.*, 58 Ala. 546; *Thierman Co. v. Commonwealth*, 123 Ky. 740, 97 S.W. 366. It has not heretofore been found necessary to condemn an act of Congress for this kind of careless journey work, though it has sometimes required a good deal of mental strain to demonstrate that some piece of legislation originating in a Senate was not a 'bill for raising revenue'. *Twin City Bank v. Nebeker*, 167 U.S. 196, 17 Sup. Ct. 766, 42 L. Ed. 134; *United States v. James*, 13 Blatchf. 207, Fed. Cas. No. 15464; *Dundee, etc., v. Parrish (C.C.)* 24 Fed. 197; *Geer v. Board of Commissioners*, 97 Fed. 435, 38 C.C.A. 250. If these courts had not assumed that

a revenue bill of Senate origin was a nullity, why spend so much time in proving that the act under consideration was not such a bill?

"Defendant has urged upon the court that in *Rainey v. United States*, 232 U.S. at Page 317, 34 Sup.Ct. at page 431, 58 L. Ed. 617, the Supreme Court declined to state that there was 'judicial power after an act of Congress has been duly promulgated to inquire in which house it originated for the purpose of determining its validity.' There was nothing in the *Rainey Case* requiring decision on the point here raised which is not (under the reasoning in *Field v. Clark*, supra) an inquiry as to the house of origin of the Cotton Futures Act. No inquiry is necessary. The certificate of Congress, the enrolled act and the statutes at large all proclaim the house in which Congress thought this bill originated, wherefore the sole question here is as to the effect of such a proclamation of unconstitutional action. To this situation the remark in the *Rainey Case* has no application."

In the *Hubbard Case*, Judge Hough and the parties litigant were, it is apparent, all agreed that the motive which lead to enactment of the Cotton Futures Act was not a revenue motive. Its real object was purely regulatory. Yet it was held that the regulatory motive was irrelevant for the purpose of determining the legal nature of the Act and that its declared nature as a tax measure, and the fact that the machinery for levy and collection was provided for, was conclusive that it was a revenue bill within the meaning of Article I, Section 7 of the Constitution. One need not go so far to reach that conclusion with respect to the Agricultural Adjustment Act, for not only is it declared to be an Act to raise revenue, and not only does it provide machinery for levying and collecting the taxes it imposes, but also it is plain that the revenue provisions are inserted in order that funds may be paid into the Treasury to meet the expenses of the Government. The Cotton Futures Act merely provided for a penalty masquerading as a tax; the taxes levied by the Agricultural Adjustment Act have no penal purpose and the proceeds are all-important to accomplishing the objects of the Act.

As further supporting the conclusion reached in the *Hubbard Case*, see *McCray v. United States*, 195 U.S. 27 (1904); *United States v. Bromley*, 12 How. 88 (1851); *Lowe v. Farowerke-Hoechst Co.*, 240 Fed. 671, (C.C.A. 2d, 1917); *Hutton v. Terrill*, 255 Fed. 860 (S.D.N.Y. 1918); *Wofford Oil Co. v. Smith*, 263 Fed. 396 (N.D. Ala. 1920).

It may be urged that two decisions of the United States Supreme Court, rendered prior to the *Hubbard Case* throw doubt on the validity of Judge Hough's conclusion. These cases are *Millard v. Roberts*, 202 U.S. 429 (1906) and *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897).

In *Millard v. Roberts* a tax payer of the District of Columbia brought a bill in equity to enjoin the Treasurer of the United States from paying out moneys of the District of Columbia pursuant to certain acts of Congress on the ground that those acts were null and void because they were revenue acts and had originated in the Senate. The three Acts in question were entitled "An act to provide for eliminating certain grade crossings of railroads in the District of Columbia, to require and authorize the construction of new terminals and tracks for the Baltimore & Ohio Railroad Company, in the City of Washington, and for other purposes", "An act to provide for eliminating certain grade crossings on the line of the Baltimore & Potomac Railroad Company, in the City of Washington, District of Columbia, and requiring said company to depress and elevate its tracks and to enable it to relocate parts of its railroad therein, and for other purposes", and "An act to provide for a union railroad station in the District of Columbia and for other purposes". The acts provided that the funds needed to reimburse the railroads for surrendering rights of way and property and to cover the cost of constructing new buildings and terminals should be paid out of the proceeds of assessments and levies upon taxable property within the District of Columbia. The Court declined to hold the Act unconstitutional, because the revenue provisions were purely incidental to accomplishing the other purposes of the bills as expressed in their titles. While it is arguable that, under the theory of this case, the Agricultural Adjustment Act is not a revenue measure, such a conclusion is probably not justified. The acts in question in the *Millard* case made no mention of a purpose to raise revenue in their titles. They set up an elaborate scheme for improvement of the terminal facilities of the District of Columbia, to which purpose the tax provisions were incidental. The Agricultural Adjustment Act, on the other hand, is entitled a revenue bill, and the tax provisions are an all-important element in the structure of the Act. Under the Agricultural Adjustment Act, considered in terms which are at all realistic, the tax provisions are palpably not incidental. It is impossible to say that they provide merely for incidental revenue which could have been secured by mere appropriation from the general funds of the government. The amounts involved necessary to effectuate the declared policy by use of the techniques of rental and benefit payments, removal of surplus, and expansion of markets, involve sums so large as to require new and additional taxation to augment the revenue of the government. That this was understood by Congress in enacting the measure is demonstrable by reference to the Congressional debates.

The *Twin City Case* is even weaker authority for the conclusion that the Agricultural Adjustment Act was not a revenue bill prior to its enactment. The act there involved was the National Banking Act of 1864 (13 Stat. 99), Section 41 of which imposed a tax, upon notes in circulation of banking associations organized under the statute, the purpose of which was to meet expenses incurred in administering the statutes. The declared object of the statute was to provide for a national currency secured by bonds of the United States. The Banking Act originated as a bill in the House of Representatives, and when it first passed the House, it included no tax provisions, which were later inserted in the Senate by way of amendment to the House Bill. Thus, although Mr. Justice Harlan did state that the Act was not a revenue

act in the strict sense, that point was not directly involved, for the Bill had originated in the House, and the mere fact that the tax provisions were introduced in the Senate did not make it a revenue bill originating in the Senate. Rainey v. United States, 232, U.S. 310 (1914); Flint v. Stone Tracy Co., 220 U.S. 108 (1911). (See also point III *infra*) Furthermore, like the statutes involved in the Millard Case, the Banking Act made no mention in its title of a revenue purpose, and the revenue sections were a relatively unimportant portion of the whole statute.

There have been cases in the lower federal courts which have refused to hold bills with incidental revenue purposes unconstitutional because they originated in the Senate. Bertelson v. White, 65 Fed. (2d) 719 (C.C.A. 1st, 1933); United States v. James, Fed. Cas. No. 15, 464 (C.C.S.D.N.Y. 1875); Geer v. Board of Com'rs., 97 Fed. 435 (C.C.A. 8th, 1899); United States v. McConnell, 10 Fed. (2d) 973 (E.D.Pa., 1926); Twin Falls Canal Co. v. Foote, 192 Fed. 583 (C.C.D. Ida. 1911); United States v. Norton, 91 U.S. 566 (1875). Viewed in the light of Judge Hough's decision in Hubbard v. Lowe, *supra*, and the other cases cited in support thereof, it is apparent that no little uncertainty attends determination of the question whether a statute including both revenue and non-revenue provisions is a bill "for raising revenue" in the constitutional sense. Story on the Constitution (5th Ed. 1905) Section 830; V. Elliott, Debates on the Federal Constitution (1907) p. 417. As regards the Agricultural Adjustment Act, the fact that the revenue purpose is expressed in the title, and the all-important character of the tax sections, strongly suggest the probability that the courts would hold it a bill for raising revenue, and would conclude that its origin in the Senate rendered it null and void. Certainly the extraordinary administrative complications and embarrassments which would attend such a result after a tax computed on the amended basis had been put into effect make it unwise to run the risk of unfavorable determination, when that risk is as great as the decisions show it to be.

II. The Bill, S. 3185, since it alters the mode of calculating the rate of processing taxes levied under the Agricultural Adjustment Act, is a revenue bill.

Assuming the Agricultural Adjustment Act to be a revenue bill, there can be no doubt but that the bill now under consideration is such. Section 2 amends Section 9 (c) of the Agricultural Adjustment Act, which defines the term "fair exchange value", which is one of the two factors upon the basis of which the rate of processing taxes is calculated. It is apparent from the House and Senate reports on S. 3185 that the bill would result in an increased rate of processing taxes on many commodities. It would seem to need neither argument nor citation of authority to support the conclusion that a bill which amends a revenue act by altering the provisions fixing the rate of taxes in such a way as to increase the amount of taxes to be collected under the act is itself a revenue bill.

III. The Bill, S. 3185 is not an amendment to a revenue bill, which the Senate may propose under Article I, Section 7 of the Constitution.

The argument may be put forward that, since the Constitution expressly empowers the Senate to "propose or concur with Amendments as on other Bills", the present bill, which amends the Agricultural Adjustment Act, could lawfully originate in the Senate. But this argument overlooks the fundamental distinction between "bills" and "statutes". The phraseology of the Constitution makes it clear that the Senate is empowered to propose amendments to bills; there is no mention of laws or statutes. And S. 3185 is not an amendment to a bill, for the Agricultural Adjustment Act, which it is intended to amend, has been completely acted upon, and after its approval attained the force of law and became a statute. Hubbard v. Lowe, 226 Fed. 135 (S.D.N.Y. 1915). Therefore the bill S. 3185 is amendatory of a statute; it is not an amendment to a bill because the Agricultural Adjustment Act is not a bill.

IV. The bill S. 3185 originated in the Senate.

Upon the reverse side of the enrolled bill S. 3185 is a certification by the Secretary of the Senate that the Act originated in the Senate. It has been held that the courts will not go behind the official certification of a bill's origin. Hubbard v. Lowe, 226 Fed. 135 (S.D. N.Y. 1915). Even if this decision were not followed, and the reports of Congress were examined, those reports show that the bill originated in the Senate.

V. Conclusion.

It is my considered opinion, in view of the circumstances hereinbefore set forth, that there is great question whether the bill S. 3185, if approved by the President, would not be null and void. Should the bill be approved, it would nevertheless be the duty of this Department to disregard all question of its constitutionality, and proceed to enforce it until an authoritative decision from the Supreme Court should establish its unconstitutionality. For administrative reasons so clear as to obviate the necessity of statement, it would be most undesirable to be faced with the necessity of enforcing a statute of such questionable validity. I therefore conclude that there is serious objection to approval of the bill, and so advise you.

Respectfully,

Seth Thomas
Solicitor.

No. 62

COTTON OPTION-BENEFIT CONTRACTS - PRODUCER
FRAUDULENTLY SECURING CONSENT OF SHARE CROPPERS .

Where it is found that a producer fraudulently induced share croppers to give their consent to a 1933 cotton option-benefit contract entered into by him, or fraudulently induced them to sell cotton to him, the Secretary may:

(1) withhold payment of any amounts which may be due in settlement of the option under the 1933 contract;

(2) set off against amounts which may become due under the 1934-1935 cotton contract, a Government claim arising out of the misrepresentation which induced the execution of the 1933 contract;

(3) rescind the 1933 contract and recover back such part of the payments made thereunder.

(See also Opinion No. 73 (Opinion Section Memorandum No. 98 A))

Opinion Section Memorandum No. 98
Dated June 26, 1934.

June 26, 1934

MEMORANDUM TO THE COMMITTEE DESIGNATED
TO DEAL WITH CONTROVERSIES BETWEEN LAND-
LORDS AND THEIR SHARE-TENANTS AND SHARE-
CROPPERS

In response to your inquiry with respect to the remedies which are available to the Secretary or to the United States against Mr. E. H. Polk, on the basis of your finding that he fraudulently induced share-croppers to give their consent to a 1933 Cotton Contract entered into by him, or fraudulently induced them to sell cotton to him, I submit the following:

OPINION

(1) The Secretary may withhold payment of any amounts which may be due in settlement of the option under the 1933 contract;

(2) The Secretary may set off against amounts which may become due under the 1934-1935 Cotton Contract, the Government's claim arising out of the misrepresentation which induced execution of the 1933 Cotton Contract;

(3) The Secretary may rescind the 1933 Contract and recover back such part of the payments made thereunder as the Courts may determine.

(4) The United States may maintain an action under Section 231 of Title 31 of the United States Code for a forfeiture of \$2,000 and double damages.

Statement of Facts

The report of the investigators indicates that Polk purchased the cotton from the share-croppers prior to entering into the contract for reduction of acreage with the Secretary. However, excerpts from the affidavits made by the complaining croppers suggest a rather different situation. Paraphrased, the allegations are that Polk stated to his croppers that the Government was prepared to pay \$11.00 an acre for plowing up cotton and asked them how much of their cotton they wished to destroy under this arrangement.

These allegations indicate a not uncommon contractual arrangement, i.e., the landlord secured an agreement from the croppers to plow up for a specified consideration, instead of purchasing the cotton

outright from the croppers. Upon the basis of the representation that the Government was paying \$11.00 per acre for plowing up cotton, the landlord sought either to obtain the entire property rights in the cotton, or to secure the consent of the share-croppers to the plow up. In point of fact, the Government was paying a cash benefit of \$17.00 an acre, or a cash benefit of \$11.00 an acre plus a cotton option worth approximately \$10.00 an acre. In short, the property right in the cotton, or the agreement of the share-croppers to plow up, was secured by a clear misrepresentation of fact. It is not clear from the record as to whether the details of the cotton program had been announced at the time the misrepresentation was made, but this would not seem to be significant as the landlord either misrepresented known facts, or represented to be true facts the truth of which he did not know. It also appears that the landlord gave certain credits to his share-croppers on his books in a number of instances approximately \$11.00, with discounts, however, for usurious interest. In some cases, no amounts were paid out.

Discussion

The landlord represented that he had obtained the consent of all lienholders and/or others having an interest in the crop. In point of fact, that was not so, regardless of which alternative state of facts may have existed.

(1) If there was a sale of the cotton to the landlord, induced by false or fraudulent representation, then it was a voidable sale, and an equitable interest remained in the share-cropper.

(2) If, on the other hand, the landlord merely obtained the share-cropper's consent by misrepresentation, clearly such share-cropper retained an interest in the crop.

Having established that the contract was secured by misrepresentation, the question of what remedies are available is presented.

(1) Section 300 of Cotton Regulations, Series 1, provides that:

"If the producer does not obtain the consent and signature of all lienholders and/or other parties having an interest in the crop on the acreage to be withdrawn from production, and the Secretary enters into a cotton contract with the producer with or without knowledge of the lack of consent of such interested party or parties, the Secretary shall have the right at any time to withdraw from such contract, or to withhold benefit payments until the consent of all such interested parties has been obtained or the matter has been otherwise adjusted."

"Benefit Payment" is defined in Section 100 of the same Regulations as:

"A cash payment moving from the Secretary of Agriculture to the producer in consideration of the reduction of cotton acreage pursuant to subsection (1) of paragraph II of the offer to enter into cotton option-benefit or benefit contracts." (Underscoring added).

"Option Benefit" is defined as:

"A cash payment defined in (d) above in combination with a cotton-option contract pursuant to subsection (2) of paragraph II of the offer to enter into cotton option-benefit or benefit contracts." (Underscoring added).

While it might be argued that Section 300 authorizes only the withholding of benefit payments and that this remedy is exclusive, and while it might be argued that Section 300 authorizes only the withholding of benefit payments and that this remedy is exclusive and consequently that any amounts due in settlement of the option contract cannot be withheld, this argument clearly cannot be sustained. The right to withdraw from the contract is specified in Section 300 as a remedy additional to the right of withholding benefit payments. The use of the disjunctive clearly sustains this. This provision of the regulations authorizing withdrawal from the contract or the withholding of benefit payments would seem to be merely a recitation of rights existing in the Secretary, except for that portion of the language authorizing the Secretary to withdraw or withhold benefit payments, even though he entered into the contract with knowledge of the lack of consent of interested parties. Assuming, as seems reasonable, that the option is not an independent contract, but constitutes consideration under the single and indivisible option-benefit contract, upon discovery that the producer has not obtained the consent of all lien holders, or has fraudulently obtained such consent, there would remain no further obligation of performance by the Secretary. He may, under Section 300 of the Cotton Regulations, *supra*, withdraw from the contract and withhold payment of the amounts due in settlement of the option.

In connection with the withholding of option payments, there are two situations:

(a) Where the option has not been exercised or was exercised apart from the Cotton Pool Agreement.

(b) Where the optionee was permitted to exercise the option under the Cotton Pool Agreement.

In "(a)" there appear to be no additional difficulties. Upon call of the option and sale of the cotton by the Secretary under the provisions of the agreement relating to the disposal of cotton after

call and payment of any surplus in excess of six (6) cents and necessary carrying charges to the optionee, there would seem to be no question but that there would be an obligation of the United States to the optionee, and that payment of this obligation may be withheld by reason of the optionee's breach.

A more difficult question is raised in "(b)". In that case the situation presented is briefly as follows: The optionee exercises his option in full settlement of his rights, privileges and benefits arising out of the option. In so exercising his option, he authorizes and directs the Secretary to sell to him cotton covered by the option. The optionee appoints the manager of the cotton pool his trustee of all right, title and interest which he may have in the cotton delivered to the pool pursuant to his authorization and direction. Participation Trust Certificates are delivered to the optionee by the pool manager entitling him to participate in benefits derived from operation of the pool. The pool manager agrees to make an "Initial Distribution" of four (4) cents per pound or twenty (\$20.00) dollars per bale, the money for such payment to be obtained by borrowing from the Commodity Credit Corporation when the cotton is sold. The pool manager, after paying charges incident to the operation of the pool, pays the Secretary six (6) cents per pound for such amount sold, plus interest on loans made to the Secretary to finance the acquisition and/or carrying of the cotton. The loan from the Commodity Credit Corporation is paid off and then, after all debts and liens against the cotton have been discharged, and expenses paid, the remaining proceeds are distributed ratably to the holders of the Trust Certificates. After sale to the optionee and delivery of the cotton to the pool manager for disposition as outlined above, the amounts received by the pool manager upon sale of the cotton would not be public monies and the obligation of the pool manager to pay to the optionee on the Participation Trust Certificates would not be an obligation of the United States.

However, the cases would seem to support a position that the original cotton contract between the Secretary and the landlord could properly be rescinded by the Secretary upon discovery of false or fraudulent representations. (See *infra*, point 3). Granting this, the option also would be rescinded by the Secretary as it constituted part of the consideration for the original cotton contract. Likewise the Pool Agreement providing for sale of the cotton to the optionee and delivery to the pool manager, as trustee, for disposition, would seem to be equally subject to rescission upon discovery of the false or fraudulent representations. The pool manager, trustee for the optionee, could stand in no better position than the optionee. If, therefore, the sale to the optionee and delivery to the pool manager may be rescinded, this rescission would result in the return of the cotton to the Secretary and a reversion to the position, as between the optionee and the Secretary, existing where no sale to the optionee and delivery to the cotton pool had taken place. In this case, the contract having been rescinded, the right to withhold payments would follow according to the arguments set forth above.

By way of caution, it may be added that this conclusion assumes that the option-benefit contract is a single, indivisible contract.

If this is so, no question of set off arises, as the Secretary may simply withdraw and refuse further performance of the contract. If the option-benefit contract is divisible into option and benefit-payment contracts, then the Secretary may set off against payments due under the option a claim for recovery of the benefit payments already made. (See points 2 and 3 infra)

2. A second possible remedy to be considered is the right of the Secretary to set off the claim against the landlord arising out of fraudulent representations made in connection with the 1933 cotton contract against amounts which may become due such landlord under a 1934-35 cotton contract. Admitting that the United States has a claim against the landlord based on such misrepresentations, and that obligations under 1934-35 cotton contracts are obligations of the United States, payable out of public moneys, there is a right, if not a duty, to set off the one against the other.

When asked whether debts due the United States from farmers must be set off against rental or benefit payments due them, the Acting Attorney General, in an opinion dated August 8, 1933, advised the Secretary of Agriculture that the duty of making set-offs under Section 227 of Title 31, U. S. C. A., is limited to judgments. The opinion states:

"The right of the United States to withhold or set off money due to a person against a debt due by such person to the Government has been recognized and exercised since the early days of our Government. It is not dependent upon the existence of a statute, but it is the common right which belongs to every creditor to apply moneys payable by him to his debtor in settlement of sums due him by the debtor".

The Acting Attorney General also quoted from Gratiot v. United States, 15 Pet., 335, 370 (1841), where the Court said:

"The United States possess the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balances due to them by the defendant, on any other account, whether owed by him as a private individual, or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him".

It is well settled that where a person is indebted to the Government under one contract, the Government may set-off without separate action an amount owing by that person under another contract. See Barry v. United States, 229 U.S. 47; Emery v. United States, 13 F (2d) 658; and Taggart's Case, 17 Co. Cl. Rep. 322. In the Barry case contractors failed to deliver coal in accordance with the terms of their contract. The Government purchased coal to meet its immediate needs, which coal had a fuel value of \$3193.32 less than that which the contractors were to deliver. This amount the Government retained from money due the contractors under a later contract. In affirming

judgment for the Government, the Court held:

***The liability might have been asserted by the Government in an action; but it might, as it did, charge it up as a set-off against its own liability. It would be folly to require the Government to pay under the one contract what it must eventually recover for a breach of the other". (Page 53 of opinion)

Assuming the general right of the United States to set-off money due persons against debts owed to the United States, it may be asked: What is the debt owed by the landlord in this case to the United States? Has the United States such a claim against this landlord as to entitle it to withhold or set-off against such claim money due under a 1934-35 contract? The United States does not have to reduce its claim to judgment, and it seems to be sufficient for the purposes of set-off if the Government takes the position that there is money due and owing to it, or which it can recover by taking proper proceedings against the particular individual.

It has been suggested that possibly the exercise of the right of set-off might relieve the optionee of obligations to perform under the 1934-35 contract. The law apparently does not recognize automatic set-offs. A set-off can be accomplished only by court action, unless, in the case of the United States an administrative determination setting off money due a person against an amount claimed to be owing to the United States is concurred in by such party. In the ordinary case of liquidated bilateral obligations, where the one owing the greater amount pays only the difference, though in legal theory an action may be brought against him on the whole debt to which he would have no "defense" in the technical sense. The Court would permit a set-off so that the judgment would be merely for the difference. The suggested argument reasons from cases involving independent covenants. For example, breach of a covenant for repairs under a lease, which entitled the leasee to damages, will not afford him the remedy of set-off without court aid. If he refuses to pay the entire rent, attempting to set-off the amount due him by reason of the breach of the covenant for repairs, the landlord may have his action of ejectment. Thus it might be argued that failure of the Government to pay the entire amount due under the 1934-35 contract, by setting off a portion of the benefit payment against its claim asserted against the optionee under the 1933 contract, would constitute a breach of the 1934-35 contract and would justify the optionee in refusing performance on his part. But no case has ever held or suggested that exercise by the Government of its right of set-off constitutes a breach of the contract against which the deduction is taken, and such a determination seems most improbable. The policy of the statute cited above is to protect the Government against the necessity of making payments to any person in excess of the net amount of moneys owing to him under all existing contracts and claims. To hold that the exercise of the right constitutes a breach of the contract against which the deduction is taken would seriously obstruct the policy of the statute and diminish the value of the right.

3. The Secretary may have resort to the courts to obtain rescission of the contract. The landlord, when he executed the Offer, represented that he had obtained and transmitted to the Secretary the written consent of all lienholders and/or other persons having an interest in the crop. In point of fact, he failed to reveal the names of the share-croppers or the nature of their interests in the cotton, and did not secure their written consent as required. Paragraphs 3, 4 and 5 of the Offer provided:

"3. This crop is subject to lien in favor of:

| NAME | NATURE OF LIEN | ADDRESS |
|------|----------------|---------|
|------|----------------|---------|

(After the name of the holder of the lien, insert nature of the lien, as landlord and/or mortgagee)

"4. Consent in writing of the lien holders has been or will be obtained by me before any part of the cotton planted is taken out of production and/or before receipt by me of any benefit which may accrue to me hereunder.

"5. If this offer is accepted I shall conform to such regulations as are or may be prescribed by the Secretary of Agriculture or authorized by him pertaining to the purposes of this offer".

In Paragraph 12 of the Offer the landlord warranted "the correctness of all matters and facts stated as such" and obligated himself "to the performance of all obligations imposed" thereby or by regulations promulgated by the Secretary. Reference to Sections 200, 205, 209 and 352 of Cotton Regulations, Series 1, will clearly demonstrate that the procurement of consent from lienholders and other interested persons was an important element of the contract. These Sections provide:

"SEC. 200. Any producer, as defined above, who owns or rents cotton lands and has or will have legal ownership of the cotton crop produced in the year 1933 on such land is eligible to become a party to a cotton contract with the Secretary. Where ownership is in more than one person, all who are interested as owners must sign the offer either as principal parties or as consenting parties".

"SEC. 205. All lien-holders and/or other persons having an interest in the 1933 cotton crop now being grown on the lands embraced in any producer's offer, if

they consent to such offer, must indicate such consent by signing their names at the place provided for that purpose on the offer".

"SEC. 209. No lienholder, in consideration of signing the consent agreement contained in the offer to enter cotton option-benefit or benefit contracts, may enter or attempt to enter into an agreement with any producer whereby the amount of the debt secured by a lien held by him against the crop of such producer is increased, or the due date of such debt made earlier. Any lien holder who enters or attempts to enter into such an agreement shall be guilty of a violation of these regulations, and any such agreement shall be null and void".

"SEC. 352. The Secretary undertakes to make compensation to the producer, whether by cash payment only or by cash payment plus a cotton-option contract, only after due proof of performance by the producer, as prescribed in regulations and/or instructions".

It is submitted that the landlord clearly was called upon to list the names of all lienholders or others having an interest in the crop and to obtain the written consent from all such lienholders; and further, that when he warranted the correctness of facts stated in the Offer, he in fact represented that there were no such interested persons and hence that there were no such persons from whom he should obtain such written consent. If he described himself as owner of the cotton, it seems that a strong argument can be made that he misrepresented the true ownership in the crop. At most, under the facts as they appear, the landlord obtained only a voidable interest or title in the cotton - an interest secured through fraud or misrepresentation practiced upon the share-croppers. Had the exact nature of his interest been known, the Secretary clearly would not have approved the Offer and entered into the contract. Among other things the Secretary contracted for the right to enter upon the land and, at his discretion, take such action as he might see fit to destroy the cotton. It may fairly be said that the Secretary, in approving the Offer, relied upon the representation that the landlord had such a clear title to the cotton as to give him the unquestioned right to contract with the Secretary for its destruction.

That nondisclosure may amount to misrepresentation is well established, especially where the facts are peculiarly within the knowledge of one party and there is a duty to disclose them. See Clark On Contracts (4th Ed., 1931), Sections 137 and 141. It is also clear that these misrepresentations were as to material facts. While materiality may sometimes be difficult to establish, the above author states that it is generally recognized that a representation is material if, had it been known to be false, the contract would not have been entered into. In this connection, Section 300 of the Regulations, quoted above, is pertinent. Materiality of the representations may be established on other grounds. As stated previously, the Secretary contracted for

the right to enter upon the land and destroy the crop in the event it was not voluntarily destroyed by the other contracting party. Paragraph 10 of the Offer provided:

"10. The Secretary shall have the right, through any person designated under his authority, of ingress and egress to and from the land embraced in this offer, and may at his discretion take such action as he may see fit to take out of cotton production the acreage covered by this offer by any means at his disposal, I hereby agreeing that no person, acting upon the authority of the Secretary of Agriculture, shall be liable in any way for any damage which may result from any reasonable action taken by such person to take out of cotton production any of the acreage covered by this offer in the event I fail to perform the requirements of any regulation with reference thereto after this offer shall have been accepted even though I may thereafter refuse to accept any benefit hereby provided for."

The Secretary or his agents might have been prevented by injunction from exercising this right, for all persons having an interest in the crop had not consented to its destruction. See Colorado v. Toll, 268 U.S. 228, where it was held that a bill in equity is a proper remedy to restrain or enjoin a federal official from doing acts that it is alleged he has no authority to do. A further ground of materiality may be suggested, to wit, that in entering into the cotton contract it was the purpose of the Secretary, in requiring that the written consent of all interested persons be obtained to make sure that the benefit and option payments would be fairly distributed among all having an interest in the crop. This is evidenced by the following comment appearing on page 3, paragraph 2 of a pamphlet entitled "Instructions to Field Workers";

"* * * Where legal ownership is in more than one person, all who are interested as owners must sign the contract form, either as principal parties or as consenting parties, before it can be accepted by the Secretary of Agriculture. It is assumed that agreements by the operators and their tenants will provide for division of payments in proportion to their interest in the crop."

By requiring every producer to obtain the written consent of all persons having an interest in the crop, it was contemplated that in the ordinary course of bargaining a fair distribution of the benefits would be made. This technique offered a convenient method of administration and was certainly proper for the Secretary to adopt for the purpose intended.

It is well established that contracts may be rescinded for fraud or misrepresentation, and it is quite generally recognized that even honest misrepresentation of material facts will justify rescission. A few quotations from Williston On Contracts will outline the general underlying principles.

"It is not necessary in order that a contract may be rescinded for fraud or misrepresentation that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient. For though the representation may have been made innocently, it would be unjust to allow one who has made false representations even innocently, to retain the fruits of a bargain induced by such representations. * * *"
(Sect. 1500)

"It is laid down in the cases that a misrepresentation must be material in order that the law may take notice of it as a fraud. If, however, a party to a bargain has made misrepresentations for the purpose of inducing action by the other, and the other party has acted, relying upon the misrepresentations, it seems that the former should not be allowed to deny that misrepresentations which have effectively served a fraudulent purpose were material. This in effect is saying that any misrepresentations which were intended to bring about a particular result and which do bring about that result are sufficiently material. * * *"
(Sect. 1490)

"In a suit in equity for rescission a plaintiff who has received consideration commonly offers in his bill to restore the consideration, and whether such an offer is made or not the decree in such a suit will provide, not simply for the return by the defendant of what he has wrongfully acquired, but for the restoration of the consideration by the plaintiff. The same principles apply where rescission is exercised without the aid of equity. The injured party must make an offer to restore what he has received on condition of receiving in return what he was defrauded into parting with, and if the offer is rejected must hold as bailee what he has received and refrain from exercising acts of ownership. The place of return is the place of the original delivery. Accordingly, if the defrauded party is unable to restore what he has received, rescission is impossible." (Sect. 1529)

The rule that the defrauded party will not be entitled to rescission if he is unable to restore what he has received is subject to exception. Thus Williston points out, in Section 1530, (Vol. III, 1922) that if the consideration was worthless, it need not be returned; and that in particular cases if it is equitable to allow rescission without complete or perfect restoration of the consideration, the modern tendency favors relief. In other words, the rule is an equitable one, and impossible or unreasonable things, which do not tend to accomplish equity in particular transactions, are not required. Williston also

observes that where circumstances permit, the courts have allowed as a substitute for restoration of the consideration a deduction of the amount of it from the recovery against the wrongdoer, and concludes that this is the most satisfactory disposition of many cases.

Clearly, the Government in this case cannot return to the landlord the crop which has been destroyed. That such an inability would not preclude the Government from invoking the aid of an equity court to rescind the contract seems quite clear. In the case of In Re American Knit Goods Mfg. Co., 173 Fed. 480 (1909), suit was instituted to rescind three contracts and to obtain the return of unpaid yarn delivered under the contracts. Though relief was denied in this instance on the ground there had been no misrepresentation of material facts, the court in answering the contention that the relief should be denied because petitioners had not returned what they had received, said: (p.482)

"The trustee objects that the petitioners are not entitled to rescission because they have not returned or offered to return what they have received from the bankrupt. This would be true in an action at law where the rescission was the act of the party, but it is not so in equity where rescission is asked for of the court. In the latter case all equities will be protected in the decree. Allerton v. Allerton, 50 N.Y. 670; Vail v. Reynolds, 118 N.Y. 297, 302, 23 N.E. 301.

"The trustee also claims that the petitioners are not entitled to rescission because there is no evidence of any intentional misrepresentation by the bankrupt or its officers. This at least in equity is not necessary. The misrepresentation of a material fact upon which the other party relies, even if innocent, is good ground for rescission. Hammond v. Pennock, 61 N.Y. 145; Carr v. National Bank & Loan Co., 167 N.Y. 379, 60 N.E. 649; 82 Am. St. Rep. 725; Smith v. Richards, 13 Pet. 26, 36; 10 L. Ed. 42; Doggett v. Emerson, 3 Story 700, Fed. Cas. No. 3, 960; Kell v. Trenchard, 142 Fed. 16, 23, 73 C.C.A. 202."

The Supreme Court of the United States has several times recognized that when the United States is vindicating its dominion over public lands by suing to rescind and cancel contracts, leases and conveyances, underlying principles of equity may not be applicable. In the case of Pan American Company v. United States, 273 U.S. 456, the United States sought to cancel two contracts and leases of lands in the Naval Petroleum Reserve. It was held that equity did not exact as a condition to the relief sought that the defendants be compensated for the cost or value of work performed or fuel furnished under the contracts. See also Causey v. United States, 240 U. S. 399; Heckman v. United States, 224 U.S. 413; and United States v. Trinidad Coal Co., 137 U.S. 160.

The Supreme Court has also recognized, in a suit between individuals, that the rule requiring one who seeks rescission of a contract

to restore what was received under the contract is one of justice and equity, and must be reasonably construed and applied. Thackrah v. Haas, 119 U.S. 499. In that case the plaintiff asked for cancellation of an assignment or transfer of his property valued at \$80,000, fraudulently obtained for \$1200.00. In the complaint the plaintiff had requested that enough of the property be sold to repay the \$1200.00 as he could not raise that sum. The court reversed the judgment which had sustained demurrers below, saying (p. 502):

"The plaintiff, without any fault of his, being unable to repay the consideration of the fraudulent transfer, equity will not require him to do so as a condition precedent to granting him relief, but will make due provision, in the final decree, for the repayment of that sum out of the property recovered. Reynolds v. Waller, 1 Wash. Va. 164; Allerton v. Allerton, 50 N.Y. 670; S.C., more fully stated in Harris v. Equitable Assurance Society, 64 N.Y. 196, 200."

While it is generally stated that in order to obtain rescission of the contract the complaining party must show that he has suffered, or likely will suffer actual loss or injury, there are many decisions which repudiate altogether this rule. In Section 112 of Black on Rescission and Cancellation (2d Ed., 1929) it is stated that these cases, though they admit the necessity of showing actual damage where the action is in tort, maintain that misrepresentations made willfully with intent to deceive and to induce one to enter into a contract which he would not otherwise have made, furnish ground for its rescission, irrespective of the question whether or not the complaining party has sustained any loss, injury or damage. Likewise, in Section 1525 of Williston On Contracts (Vol. III, 1922) it is said: "It is not necessary that actual damage shall have resulted from fraud in order to justify rescission."

The following quotation, taken from the case of King v. Lamborn, 186 Fed. 21, 29 (1911), indicates that at least two federal cases seem to support the proposition that a complaining party need not show loss, injury, or damage in order to be entitled to rescission of a contract:

"As was said by Archbald, D.J., in Mather v. Barnes, etc. (C.C.) 146 Fed. 1000, 1004:

"The general principles upon which a suit of this kind proceeds are too well settled to need the citation of authorities. A misrepresentation with regard to material facts by which a purchase of property is intentionally induced amounts to a fraud which vitiates the transaction, and entitled the purchaser to be relieved. * * * Neither does it matter if misrepresentation be proved that the bargain, even so, was a good one, from which the purchaser is likely to sustain no loss. In an

action of deceit, no doubt, this would be relevant on the question of damages in order to show that there were none; * * * but not so upon a bill to rescind. Hansen v. Allen, 117 Wis. 61, 93 N.W. 805; Clapp v. Greenlee, 100 Iowa, 586, 69 N.W. 1049. The purchaser is entitled to the bargain which he supposed and was led to believe that he was getting, and is not to be put off with any other, however good. It is of no consequence in the present instance, therefore, that the plaintiffs got coal lands of intrinsic value, which are worth perchance all that was paid for them, if they were fraudulently induced to believe by representations for which the defendants are responsible that the upper Freeport vein, for which they negotiated, underlaid the whole property, whereas, in fact, it extends over but a comparatively limited part.'

"The principle is pointedly illustrated in Hansen v. Allen, the case cited by Judge Archbald. The plaintiff was shown one piece of land, but purchased another, believing in reliance upon the representations of the agent of the vendor that he was purchasing the one shown him. In deciding the case, Cassaday, C. J., speaking for the court, said:

"It is claimed that even if the plaintiff was induced to make the contract by such fraud, yet there is a failure on the part of the plaintiff to show that he was actually damaged by reason of such fraud. It is enough to say that the plaintiff was entitled to have the particular piece of timbered land with a stream of water upon it which had been pointed out to him, and for which he had actually contracted, instead of a different piece of land situated at some other place.'

"So it was directly held in MacLaren v. Cochran, 44 Minn. 255, 258, 46 N.W. 408, 409;

"If a party is induced to enter into a contract by fraudulent representations as to a fact which he deems material, and upon which he has a right to rely, he may rescind the contract upon the discovery of the fraud, and the party in the wrong should not be heard to say that no real injury can result from the fact misrepresented.'

"To the same purpose, see Williams v. Kerr, 152 Pa. 560, 25 Atl. 618; Potter v. Taggart, 54 Wis. 395, 11 N.W. 678; Martin v. Hill, 41 Minn. 337, 43 N.W. 337; Harlow v. LaBrun, 151 N.Y. 278, 45 N.E. 859; Wainscott v. Occidental Bldg. & Loan Ass'n. 98 Cal. 253, 33 Pac. 88; 14 Am. & Eng. Ency. of Law, (2d Ed.) 140.

"Authorities are cited, none from the federal courts, however, which are in apparent conflict with these. Among them are the following: American Bldg. & Loan Ass'n., 48 Neb. 455, 67 N.W. 500; Jakway v. Proudfit, 76 Neb. 62, 106 N.W. 1039, 109 N.W. 388; Cochran v. Pascault, 54 Md. 1; Wenstrom Consolidated Dynamo & Motor Co. v. Furnell, 75 Md. 113, 23 Atl. 134; Bom v. Rosser, 131 Ala. 215, 31 South. 430. But they do not appeal to our judgment as founded upon the better reasoning or voicing the sounder rule."

Obviously, it would be difficult to demonstrate in these cases that the Government has sustained actual pecuniary loss or injury, but it is evident that the Government did not get exactly what it bargained for. It may be argued that the fraud or misrepresentations of the landlord have detrimentally affected the Government's program of adjustment of production, and to this extent there certainly has been damage or injury. On the theory that portions of the benefits were intended for the share-croppers, it may be said that the landlord has attempted to prevent such croppers from receiving money intended for them. Such interference not only injuriously affects the croppers, but hampers the Secretary in carrying out the policy of the Agricultural Adjustment Act.

4. An additional remedy is available to the Secretary under Section 231 of Title 31, U.S.C.A., which provides:

"Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of Section 80 of Title 18, shall forfeit and pay to the United States the sum of \$2,000. and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Section 80 of Title 18 U.S.C.A., referred to in the above statute provides:

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corpora-

tion in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be fined not more than \$10,000. or imprisoned not more than ten years, or both."

It is provided in Sections 232, 233, 234, and 235 of Title 31, U.S.C.A., that for violations of Section 231 suit may be instituted either by the United States, or by individual persons for themselves as well as the United States, and where such suit is brought by individuals they are entitled to receive one-half of the amount of the forfeiture and one-half of the damages recovered and collected. These sections provide:

Section 232.

"The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall where-soever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States; but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent."

Section 233.

"It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be dili-

gent in inquiring into any violation of the provisions of Section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of \$2,000. and twice the amount of the damages sworn to in the affidavit of the person bringing the suit."

Section 234.

"The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court; PROVIDED, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States."

Section 235.

"Every such suit shall be commenced within six years from the commission of the act, and not afterward."

It has been held that the remedy given by these sections is merely cumulative and that the right of the United States to sue for the recovery of money obtained from it by means of fraudulent claims existed at common law. Thus the court in Pooler v. United States, 127 Fed. 519 held that the United States could in seeking to recover amounts wrongfully received by a person as an alleged pensioner, elect to sue either at common law or bring an action under the above statutory provisions. It was also pointed out that the remedy given by these sections

"is strictly penal, and not only so, but qui tam, and therefore under no rule of interpretation can it be regarded as superseding the prior right of the United States to proceed at common law."

In conclusion, it should be noted that the Secretary is authorized under the Act to make benefit payments in connection with the reduction of production provided for either by agreements with producers or by other voluntary methods. In the instant case the cotton was actually plowed under pursuant to the terms of the contract, but the share-croppers whose interest was obtained through fraud or misrepresentation may be said to have taken some part in the reduction of pro-

duction. In our opinion there has been a reduction of production secured by voluntary means and the Secretary would be authorized to make benefit payments to the share-croppers. It is submitted that an equitable provision which the Secretary should make for these share-croppers would be to pay them the percentage of the benefit payment and the option settlement money which would be equivalent to their interest in the cotton which was destroyed.

Francis M. Shea,
Chief, Opinion and Brief Section,
Office of the General Counsel.

No. 63

AUTHORITY OF AGENTS OF THE DEPARTMENT
OF AGRICULTURE TO ADMINISTER OATHS

Under Section 93 of Title 5 of the United States Code, an officer or clerk of the Department of Agriculture detailed to investigate frauds upon, or attempts to defraud, the Government, or any misconduct of any officer of the United States, has authority to administer an oath to any witness attending to testify or depose in the course of such investigation.

However, it would appear that a broader authority to administer oaths may be conferred upon agents or employees of the Department of Agriculture by designation under Section 521, 5 U.S.C.A.

June 28, 1934

MEMORANDUM TO MR. ALGER HISS

With reference to Mr. Anderson's inquiry dated June 13, 1934, addressed to you, I submit the following:

QUESTION

May persons making investigations for the Agricultural Adjustment Administration themselves administer oaths without securing a notary public, Justice of the Peace, or other official to do so?

OPINION

Under Sections 93 of Title 5 of the United States Code, an officer or clerk of the Department of Agriculture detailed to investigate frauds upon, or attempts to defraud, the Government, or any misconduct of any officer of the United States, has authority to administer an oath to any witness attending to testify or depose in the course of such investigation. However, it would appear that a broader authority to administer oaths may be conferred upon agents or employees of the Department of Agriculture by designation under Section 521 of Title 5 of the United States Code.

DISCUSSION

Rev. Stat. Sect. 183 as amended, and to which Mr. Anderson refers, constitutes section 93 of 5 U.S.C.A. and reads as follows:

Sect. 93. Oaths to witnesses. Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps or Coast Guard, detailed to conduct an investigation, and the recorder, and if there be none, the presiding officer of any military, naval or Coast Guard board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation. (R.S. §183; Mar. 2, 1901, c. 809, §3, 31 Stat. 951; Feb. 13, 1911, c. 43, 36 Stat. 898; Jan. 28, 1915, c. 20, §1, 38 Stat. 800.)"

It appears from the above that an officer or clerk of the Department of Agriculture if "lawfully detailed" to investigate frauds or irregularities of the character described, has by virtue of such detail, authority to administer "an oath to any witness attending to testify or depose in the course of such investigation".

In United States v. Graff, Fed. Cas. 15, 244 (1878), the sworn statement of the accused who, before his indictment, had been "required" by a special agent of the Treasury detailed to investigate frauds on the Government to appear at the Customs House where he had voluntarily answered questions put to him, was held admissible. Administration of the oath was held to be authorized by Section 183 of the Rev. Stat. In United States v. Law, 50 Fed. 915 (1892), in a prosecution for perjury, it was held that a notary public was without authority to administer an oath in an investigation by the Post Office Department into the loss of a registered letter, but the opinion contains the dictum (P. 917) that an inspector of the Post Office Department, if present, would doubtless have had the authority, under Section 183, to administer such oath. No other citations of the statute have been found.

Although the provisions of this statute are undoubtedly useful, it does not provide as wide a latitude as to the circumstances, under which a representative of the Department of Agriculture may administer an oath as that provided by Sect. 521 of 5 U.S.C.A. This section provides:

"Such officers, agents, or employees of the Department of Agriculture of the United States as are designated by the Secretary of Agriculture for the purpose are authorized and empowered to administer to or take from any person an oath, affirmation, or affidavit whenever such oath, affirmation, or affidavit is for use in any prosecution or proceeding under or in the enforcement of any law committed to or which may be committed to the Secretary of Agriculture or the Department of Agriculture or any bureau or subdivision thereof for administration. Any such oath, affirmation, or affidavit administered or taken by or before such officer, agent, or employee when certified under his hand and authenticated by a seal of the Department of Agriculture may be offered or used in any court of the United States and shall have like force and effect as if administered or taken before a clerk of such court without further proof of the identity or authority of such officer, agent, or employee. (Jan 31, 1925, c. 124, § 1, 43 Stat. 803.)"

Under Section 93 the authority is limited to "any officer or clerk". While these terms undoubtedly include any employee of

the Department likely to be detailed to make investigations, they probably would not include mere "agents", not employees. Moreover, the oath provided for under Section 93 is "to any witness attending to testify or depose." The word "witness" may well be construed as having a more restricted and technical meaning than the word "person" used in section 521, especially when qualified by the phrase "attending to testify or depose", since the earlier statute appears to contemplate attendance at some place where proceedings of a more or less formal character are being conducted. Furthermore, under Section 93, the officer or clerk must be one "detailed to investigate frauds, on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States," and the oath may be administered only "in the course of such investigation." Section 521 on the other hand, authorizes any officer, agent or employee of the Department, "designated for the purpose" by the Secretary, to administer to or take from any person an oath, affirmation or affidavit whenever the same is for use "in any prosecution or proceeding under or in the enforcement of any law" committed to the Secretary for administration. It is apparently not necessary that any investigation be formally undertaken, or that the officer, agent or employee be detailed for such purpose; but the oath may be administered by the designated officer, agent or employee to any person, whenever the testimony is for use in the course of enforcement.

It would seem, therefore, that officers or clerks detailed for investigations of the type in question have, without the necessity of further action by the Secretary, authority to administer an oath under certain circumstances. A designation pursuant to Section 521, would appear to enlarge their authority to administer oaths under circumstances in which the authority given under Section 93 may not apply. Moreover, such designation is not limited to officers and clerks formally detailed to make investigations.

Francis M. Shea,
Chief of Brief and Opinion Section,
Office of the General Counsel.

No. 64

RESTRICTIONS ON SUGAR IMPORTED FROM
CUBA

Sugar imported from Cuba prior to January 1, 1934 is not to be deducted from the Cuban quota for 1934, established under the Agricultural Adjustment Act, as amended.

Under existing regulations there is no requirement that Cuban sugar arriving in the United States during 1934 and placed in a bonded warehouse be disposed of before December 31, 1934.

June 28, 1934

MEMORANDUM TO MR. GILCHRIST

In response to your memorandum of June 23, 1934, requesting my opinion as to certain questions raised by Farr & Co., in their letter of June 5, 1934, I reply as follows:

1. Sugar imported from Cuba prior to January 1, 1934, it seems to me clearly is not to be deducted from the Cuban quota for 1934. The regulations thus far issued are clearly limited to prohibitions (a) against the importation during the calendar year 1934 of sugar from Cuba in excess of the fixed quota and (b) against processing or marketing in Continental United States sugar imported during such calendar year in excess of the quota.

We do not at this time propose to pass upon the question as to whether or not processing quotas might have been fixed restricting the amount of sugar from Cuba which might be processed in the United States regardless of when imported.

2. As to the question of whether Cuban sugar arriving in the United States during 1934 and being placed in a bonded warehouse will have to be disposed of before December 31, 1934, it is my opinion that there is no requirement under existing regulations that such disposition must be made during the specified calendar year. Under the present regulations, the sugar would have been properly imported and could therefore be disposed of at any time. However, the Secretary is not limited to the fixing of import quotas. He might in the future fix processing quotas. Such quotas might properly restrict the amount of Cuban sugar that could be processed in the United States during that calendar year. However, I think serious constitutional difficulties would be raised if the regulations promulgated in this regard should prohibit the processing of the sugar which had already been legally imported. It does not seem to me, however, that we are called upon to answer queries as to what rights Farr & Co. may have under future regulations. Under the existing regulations, we can safely answer that the sugar already imported would not come within an import quota for 1935.

Francis M. Shea,
Chief of Brief and Opinion Section.

No. 65

APPOINTMENT OF ADMINISTRATORS FOR HAWAII
AND PUERTO RICO

Assuming that such appointments carry with them no salary, the Secretary may appoint the Governor of Hawaii and the Governor of Puerto Rico as administrators of the Act, with respect to sugarcane and sugar beets, in Hawaii and Puerto Rico respectively. His authority to appoint them to administer the Act generally in those areas is doubtful.

Opinion Section Memorandum No. 114
Dated June 29, 1934.

June 29, 1934.

MEMORANDUM TO MR. GILCHRIST, OFFICE OF THE GENERAL COUNSEL

In reply to your memorandum of June 19, 1934, I submit my opinion on the question stated below. Your question relating to the appointment of officers to allot quotas for Hawaii and Puerto Rico is covered in a separate memorandum.

QUESTION

May the Secretary of Agriculture appoint the Governor of Hawaii and the Governor of Puerto Rico as Administrators of the Act, with respect to sugarcane and sugar beets, or generally, in Hawaii and Puerto Rico, respectively?

OPINION

Assuming that such appointments carry with them no salary, the Secretary may appoint the Governor of Hawaii and the Governor of Puerto Rico as administrators of the Act, with respect to sugarcane and sugar beets, in Hawaii and Puerto Rico, respectively. His authority to appoint them to administer the Act generally in those areas is doubtful.

(1)

The Secretary has authority, under the Agricultural Adjustment Act, to appoint an administrator, with respect to sugarcane and sugar beets, for Hawaii and for Puerto Rico.

The authority of the Secretary to make such appointments must be found within the terms of the Act.

Section 10(a) provides that the Secretary

"may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title"

These general provisions are broad enough; in themselves, to authorize the appointment of an administrator for any area to which the Act applies if "necessary to execute the functions vested" in the Secretary by the Act. The Act applies to Hawaii and Puerto Rico. Section 10 (f). The necessity of the appointment is a matter wholly within the discretion of the Secretary to determine. The method of the appointment, by the head of an executive department acting under statutory authority, is such as to constitute the appointee an officer of the United States, assuming that the duties are of a continuous and responsible nature consistent with the idea of public office rather than of mere employment. See 31 Op. Atty. Gen. 201, 203 (1918). For reasons which will be noted later, it is assumed that no compensation is contemplated, and that therefore the appointee would not fall within the classification of employee. See 29 Op. Atty. Gen. 593, 596 (1912).

The general provisions quoted above, however, are limited by the following express provision regarding the appointment of state administrators;

"And provided further, that the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the consent of the Senate."

This provision appears to contemplate the appointment of an administrator in each state, and requires that, if made, the appointment shall be by the President and subject to confirmation by the Senate. The reference is to "The State Administrator," indicating that only one is contemplated, and the duty of such Administrator is "to administer this act", and not a part of the Act only. No restriction is placed upon the Secretary as to the number of administrators, with duties limited to particular functions and commodities, who may be appointed in any area.

It is my opinion, therefore, that even if the word "state" is to be construed as including Puerto Rico and Hawaii, the Secretary may appoint an administrator for such areas with duties limited to sugarcane and sugar beets.

(2)

The authority of the Secretary to appoint general administrators of the Agricultural Adjustment Act in Puerto Rico and Hawaii is doubtful.

If "State" as used in the proviso in Section 10 (a) relating to administrators includes the organized territories and Puerto Rico, then the appointment of an administrator for such areas must be made by the President, if at all. It is plain that neither of these is a "state" in the constitutional sense, and in the sense in which Congress is deemed to have used the word in statutes defining the jurisdiction of the federal courts. Hepburn v. Ellzey, 2. Cranch, 443 (1805); New Orleans v. Winter, 1 Wheat. 89 (1816). But it does not follow that it may not be a "State" within the meaning of a statute on a subject on which Congress may freely legislate for all territory subject to the jurisdiction of the United States.

A statute regulating the taking on of pilots on any water "forming the boundary between two states" has been held to apply to the Columbia River constituting the boundary of the State of Oregon and the then Territory of Washington. The Ullock, 19 Fed. 207 (1884). The court pointed out that the constitutional considerations which led to the narrow construction of the word "state" adopted by Chief Justice Marshall in Hepburn v. Ellzey, *supra*, did not apply to legislation of this character, enacted under the commerce clause, and accepted as a guide to construction the purpose of the statute and the mischief sought to be remedied. The decision is in contrast to U.S. v. Ames, 95 Fed. 453, (1899), in which the court, conceiving itself bound by the "Constitutional" construction, held that a complaint that a person has caused lottery tickets to be transported from a state into a territory charges no offence under a statute making it an offense to cause lottery tickets to be transported from one state to another. The Supreme Court has held that, under a statute permitting the taxation of national banks "by authority of the State within which the association is located," territories possess the same power to tax such shares as is enjoyed by states which are members of the Union. Talbott v. Silver Bow County 159 U.S. 438 (1891). Here the court found in the national character of the banking system, including the territories as well as the States, a guide to the interpretation of the word "state" when used in relation to such a system and unaccompanied by words of restriction and limitation, and said: (p. 443, 444)

"* * * while the word State is often used in contradistinction to Territory, yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union."

"Given a system of such national character, and such uniform and universal operation through the entire territorial limits of the country, before any particular section of the statute creating it shall be tortured into creating a discrimination and difference in privileges and burdens by reason of locality its language must imperatively demand such construction."

While Puerto Rico is not, like Hawaii, a fully organized territory, its position is analogous thereto. Porto Rico v. Rosaly y Castillo 327 U.S. 270, 274 (1913), and it has even been specifically described as a "territory" in an act of Congress. 42 Stat. 993. (1922) No reason is seen why the rules of construction followed in the above cases should not be applied to Puerto Rico as well as to Hawaii in an appropriate case.

There is of course no question of particular privilege or burden in interpreting the proviso regarding State Administrators with reference to Hawaii and Puerto Rico, which is purely an Administrative matter. The legislative history furnishes no clue as to whether the term "state" was intended to be used in a strict and limited sense. The proviso was added to the Act without debate by an amendment to the Farm Credit Act made by the Senate and originally read as follows:

"And provided further, That the functions of such officers, employees, and experts in each State shall be executed under the supervision of a State administrator for such State, to be appointed by the President, by and with the advice and consent of the Senate."

In the Committee on Conference of the two houses it was modified to assume its present form which does not make it mandatory that State Administrators be named. It is of course quite possible that Congress while it extended the Act to Puerto Rico and other possessions and territories, might have intended a distinction in matters of administration, so as to require state administrators to be subject to presidential appointment and Senate confirmation while leaving territorial administrators to be appointed by the Secretary. The language used, however, is susceptible of the wider construction, and, in view of the doubt arising from it, I am of the opinion that it would be inadvisable for the Secretary to appoint administrators for either of these areas without some restriction as to the scope of their administrative duties under the Act.

(3)

Subject to statutory limitations relating to salary, there is no impediment to the appointment of the Governors of Hawaii and Puerto Rico, respectively, as administrators for such areas, with respect to sugarcane and sugar beets.

It is clear that there is no incompatibility between the duties of an administrator, with limited scope, under the Agricultural Adjustment Act and the duties of the Governor in Hawaii and Puerto Rico, respectively. The execution of the Act in these areas is already within the general scope of their duties. Thus the Governor of Hawaii is

"responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory."
48 U.S.C.A. Section 532.

Similarly, the Governor of Puerto Rico is

"responsible for the faithful execution of the laws of Porto Rico and of the United States applicable in Porto Rico...."
48 U.S.C.A. Section 771.

Where there is no incompatibility between two offices, and there is no statutory prohibition against their being held by the same person, the practice of appointing an officer to fill the duties of another office, is not objectionable. See U. S. V. McCandless, 147 U.S. 692, 693 (1893). Statutory provisions against the payment of double salaries, extra services, and extra allowances have been held to have no application to the case of two distinct offices, places or employments each with its own compensation and duties, held by one person at the same time. U.S. v. Saunders. 120 U.S. 126 (1887). Section 62, of 5 U.S.C.A., however, provides:

"No person who holds an office the salary or annual compensation attached to which amounts to twenty five hundred dollars shall be appointed to or hold any office

to which compensation is attached
unless specially authorized by law;"

The prohibitions of this section of the Code apply to appointment and holding as well as to the actual payment of salary. Hence, the Governor of Hawaii (and similarly the Governor of Puerto Rico) already occupying an office to which a salary in excess of \$2500 is attached may not be appointed to the office of Administrator if compensation is attached thereto.

The statutory provision contained in Title 31 U.S.C.A., Section 665, against the acceptance of "voluntary service for the Government" does not preclude appointments to office without compensation, when Congress has fixed no salary for the office, but has been construed only to bar "service intruded by a private person as a 'volunteer' and not rendered pursuant to any prior contract or obligation." 30 Op. Atty. Gen. 51. (1913). The appointment of the Governors of Hawaii or Puerto Rico, without compensation as administrators under the Agricultural Adjustment Act is therefore not objectionable under this Section.

It remains to consider whether the appointment of a sugar administrator for such an area can be regarded as an evasion of the proviso which requires that the State Administrator appointed to administer this Act in each state shall be appointed by the President, etc. If the proviso were so worded as to require the appointment of an administrator for each territory and state, there might be objection to the appointment by the Secretary of administrators in such areas responsible for the administration of the Act as to various basic commodities. However, no such appointments are required, and none has been made. The appointment of special sugar administrators for Hawaii and Puerto Rico is a matter of administrative convenience, in view of the separate quotas which Congress itself has provided for such areas. In this connection it should be noted that the Costigan-Jones or so-called "Sugar" Act was enacted by the Congress after the proviso relating to state administrators had been added to the Agricultural Adjustment Act. The quotas provided for are based upon production areas, and not primarily upon political and territorial lines. See Op. Sect. Mem. No. 83. For the purposes of the "Sugar" Act, therefore, Hawaii and Puerto Rico are viewed as distinct production areas, corresponding to the "beet-sugar producing area" of continental United States and the States of Louisiana and Florida which are treated together for quota purposes. It is to be expected that administration should conform, as expediency and efficiency may require, to the areas thus designated by Congress itself, and nothing in the amended Act can reasonably be construed to preclude necessary adaptations of administrative machinery to this end. Certainly the literal wording of the proviso does not bar the proposed appointments if the duties of the Administrators are confined to sugar only and do not require that

they administer the Act generally in their respective areas. It may be noted also, as indicating that these appointments are not contrary to the policy of the proviso, that both the Governors of Hawaii and Puerto Rico are presidential appointees in the first instance.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 66

PROCEEDS OF TAX ON CUBAN SUGAR

Proceeds from processing taxes on Cuban sugar may not be included in special funds to be created for the purposes set forth in Section 12 (b) but must be deposited into the Treasury as part of the general receipts "from all taxes imposed under this title."

Opinion Section Memorandum No. 104
Dated June 30, 1934.

June 30, 1934.

MEMORANDUM TO MR. GILCHRIST

In a memorandum dated June 22, 1934, you request my opinion as to whether the proceeds from processing taxes on Cuban sugar or any other commodity can be expended by the Secretary in the Philippine Islands or in the Virgin Islands for the purposes set forth in Section 12. It is my opinion that, while the proceeds from such taxes may ultimately be available for some of the purposes specified in Section 12 of the Agricultural Adjustment Act, they may not be appropriated for special funds for such purposes but must be deposited into the Treasury as part of the general receipts "from all taxes imposed under this title" (see Section 12 (b)).

Section 12 (b) specified five purposes for which the proceeds derived from the taxes imposed under the Agricultural Adjustment Act may be appropriated: rental and benefit payments, removal of surplus agricultural products, refunds on taxes, expansion of markets, and administrative expenses. It is impossible to make rental and benefit payments under Section 8 (1) in the Virgin Islands and the Philippines on funds derived from the processing of sugar imported from Cuba without making the Act applicable to those regions. It is arguable that the proceeds from these taxes may be used as part of the general fund available under Section 12 for the removal of surplus agricultural products provided that the commodities which are being removed come properly within the definition of "surplus agricultural products", but this would also seem to presuppose the Act's applicability. Refunds on taxes are possible but I assume that they are not the type of expenditures in which you are interested. However, I think that there is no doubt at all about the power of the Secretary to use these proceeds (as part of a general fund in the Treasury) for the expansion of markets and for administrative expenses.

You are correct in your assumption that funds derived from the tax on the processing in continental United States of sugar from the Philippine Islands or the Virgin Islands are available for expenditure there without the necessity of making the Act applicable thereto. (See Opinion No. 103).

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

PURCHASE OF RUM DISTILLERIES
IN THE VIRGIN ISLANDS

The expenditure of monies of the separate fund contemplated under Section 15(f) of the Agricultural Adjustment Act, as amended, for the purchase of rum distilleries in the Virgin Islands, to provide a market for molasses and cane juice and to give employment to agricultural labor otherwise unemployed, is an expenditure "for the benefit of agriculture" within the meaning of Section 15(f).

Funds appropriated by Section 12(b) may be used for the purpose of expanding markets for products of the Virgin Islands only if the provisions of the Act are first made applicable to the Virgin Islands.

June 30, 1934.

MEMORANDUM TO MR. GILCHRIST

You ask two questions in a memorandum dated June 22, 1934, relative to a plan of the Department of the Interior to purchase two rum distilleries in the Virgin Islands in order to effectuate the rehabilitation of the rum industry there. In order to pay labor for planting and harvesting sugar to be taken to the distilleries for the production of molasses and cane juice; from which the rum is to be made, and also to pay the labor employed in the distilleries, it is desired to use processing tax money from two sources: (1) the separate fund which can be established for the Virgin Islands under the provisions of Section 15(f) of the Agricultural Adjustment Act, as amended, and (2) the taxes which will be collected on the processing of Cuban sugar in continental United States, to be expended by the Secretary pursuant to Section 12 of the Agricultural Adjustment Act.

You ask two questions with respect to this plan: (1) whether the separate fund contemplated under Section 15(f) would be used "for the benefit of agriculture" if it were used for the above outlined purpose, and (2) whether this will be an appropriation of funds for the expansion of markets for agricultural products (rum) under Section 12.

There are two sources from which the separate fund contemplated under Section 15(f) of the Agricultural Adjustment Act, as amended, can be derived. The first is "all or part of the taxes collected from the processing of sugar beets or sugarcane" in the insular territories and possessions of the United States; the other is "the processing in continental United States of sugar produced in, or coming from," the insular areas. As to the first source, it is requisite that the provisions of the Act be made applicable to such regions before the proceeds can be held as a separate fund to be expended under the direction of the Secretary of Agriculture, with the approval of the President. There is no comparable requirement with respect to the second source, so that even without the extension of the provisions of the Act to the Virgin Islands, taxes upon the processing in continental United States of sugar produced in, or coming from the insular areas, can be held as a separate fund. Inasmuch as the expenditure of this revenue in connection with these rum distilleries will serve to provide a market for molasses and cane juice and give employment to agricultural labor which would otherwise be unemployed, I conclude that it is for the benefit of agriculture under the terms of Section 15(f).

Your second question, as stated, seems to involve some misapprehensions with respect to the availability of such taxes under Section 12 of the Act. You appear to conclude that money collected from the processing of Cuban sugar in continental United States can be earmarked and rendered available for expenditure by the Secretary for specific purposes. Section 12 has been consistently interpreted to mean that the proceeds of all taxes under the Act must be covered into a general fund in the Treasury, and the provisions of Section 15(f) are an

exception to this rule. The Secretary, if he wishes, may appropriate amounts equivalent to the revenue derived from the processing of Cuban sugar in continental United States but he must do so out of the general fund and may not appropriate such revenues directly.

If the rum distilleries go into effective operation, the only agricultural products whose market they will serve to increase will be products of the Virgin Islands. It was not intended, in adopting the provisions of Section 12(b), to expand the markets of agricultural products of areas not subject to the provisions of the Agricultural Adjustment Act. Therefore, any appropriation which expands the markets for products of the Virgin Islands can be said to be an appropriation for the expansion of markets for agricultural products justified under Section 12(b), only if the provisions of this Act are first made applicable to the Virgin Islands.

Furthermore, it is inaccurately assumed in your memorandum that the agricultural product whose market will be expanded is rum. The plan, as I read it, does not have anything to do with expanding the market for rum but is a method of expanding the market for cane, molasses and cane juice.

Francis M. Shea,
Chief of the Brief and Opinion Section,
Office of the General Counsel.

No. 68

RESTRICTIONS UPON SUGAR ENTERING IN
EXCESS OF QUOTAS

The Secretary may not prohibit the processing, for all purposes, of sugar entering the United States in excess of the quotas for the areas dealt with in Sections 8a(1)(A)(i) and (ii) of the Agricultural Adjustment Act; but, in order effectively to prohibit the processing of such sugar "for consumption in continental United States," he may make such reasonable regulation as may be necessary to identify and segregate sugar not destined for such consumption; and specifically may require that no sugar be released from a refinery except upon compliance with requirements which will reasonably satisfy the Secretary that such sugar is not for consumption in continental United States.

June 30, 1934.

MEMORANDUM TO MR. GILCHRIST, OFFICE OF THE GENERAL COUNSEL

In reply to your memorandum of June 12th, I herewith submit my opinion upon the following questions:

QUESTIONS

- (1) May the Secretary by regulation prohibit the processing in the United States of sugar entering the United States in excess of quotas provided in Section 8a (1) (A) (i) and (ii), notwithstanding the fact that such sugar may not be for consumption in continental United States?
- (2) May the Secretary by regulation require that such sugar, if processed in the United States, be segregated or identified and not released from the refinery unless the Secretary of Agriculture is satisfied that it is not for consumption in the United States?

OPINION

The Secretary may not prohibit the processing, for all purposes, of sugar entering the United States in excess of the quotas for the areas dealt with in Section 8a (1) (A) (i) and (ii); but, in order effectively to prohibit the processing of such sugar "for consumption in continental United States," he may make such reasonable regulation as may be necessary to identify and segregate sugar not destined for such consumption; and specifically may require that no sugar be released from a refinery except upon compliance with requirements which will reasonably satisfy the Secretary that such sugar is not for consumption in continental United States.

The first of these questions calls primarily for consideration of the scope of the authority conferred upon the Secretary by Section 8a (1) (A) (i) and (ii). The Secretary is expressly authorized to "forbid processors, handlers of sugar, and others from . . . processing or marketing in, continental United States, and/or from processing in any area to which the provisions of this title with respect to sugar beets and sugarcane may be made applicable . . . for consumption in continental United States, sugar . . . in excess of quotas fixed by the Secretary . . ." The phrase "for consumption in continental United States" is set off by commas. It, therefore, must be read as qualifying not only the phrase immediately preceding, relating to processing in outlying areas, but also to that next preceding, relating to processing in continental United States. It is, accordingly, not all sugar in excess of quotas the processing of which the Secretary is authorized to forbid but only sugar "for consumption in the United States".

The suggestion has been made that processing itself constitutes consumption, and that the Secretary may therefore prohibit the processing in the United States of all sugar in excess of quotas. This suggestion, in my opinion, is wholly untenable. It is, in the first place, not consistent with the meaning of the word "consumption". Consumption is defined as meaning "gradual destruction, as by burning, eating, etc., or by using up, wearing out, squandering, etc.; as, the consumption of food or of clothing by the people", and in the technical economic sense, as "the destruction of goods in the satisfying of human needs". Funk & Wagnalls, New Standard Dictionary (1931). Consumption is thus antithetical in meaning to the idea of improvement or refinement for use which is implicit in the term "processing". The very manner in which the phrase "for consumption" is used in paragraph (A) (i) shows that consumption is recognized as a stage subsequent to processing. The Secretary may forbid processing sugar for consumption in continental United States. If processing were equivalent to consumption the addition of "for consumption" would be meaningless. Proof that sugar processed in the United States but not finally consumed therein is not within the quotas based upon consumption is afforded by the provision that any imported sugar with respect to which a drawback of duty is allowed under Section 313 of the Tariff Act of 1930 (on account of the export of articles in the manufacture of which imported merchandise is used) is not to be charged against the quotas. Further internal evidence as to the sense in which the word "consumption" is used might be cited, but is not necessary to demonstrate that it is used in the Act as meaning a stage subsequent to that of processing.

The foregoing discussion is not intended to suggest that "consumption is to be construed to mean only ultimate food consumption. Much sugar is, of course, further processed after being refined. Where imported sugar is used in the manufacture of other products, such use may well be treated as "consumption". The importation of sugar which is to be further processed by being used in manufacturing may, therefore, be prohibited unless the sugar is to be exported in manufactured form, in which case it will be exempt from the quota under the drawback proviso to Section 8a (1) (A) (i).

Clearly, authority given to forbid the processing of sugar for consumption in the United States cannot be deemed to embrace authority to forbid the processing of sugar not for consumption in the United States. To give the statute such a construction would be to disregard the limitations which its language imposes upon administrative action.

But to say that the Secretary may not wholly forbid the processing of imported sugar not destined for consumption in continental United States is not to say that he may not regulate it to the extent necessary to assure its segregation from sugar which is to be consumed in the United States. By Section 10 (c) of the Act, the Secretary is authorized, "with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title". The test of the propriety of any such regulation, therefore, lies in its relation to the execution of the powers conferred upon the Secretary. Regulations issued under express statutory authority, within the field of the statute and reasonably designed to carry out duties therein entrusted to administrative officers, are valid. See United States v. Grimaud, 220 U.S. 506, 518 (1911); In re Kollock, 165 U.S. 526, 533 (1897); Fawcus Machine Co. v. United States, 282 U.S. 375, 378 (1931). In order to administer a plan prohibiting the processing of excess sugar for consumption in continental United States, it is clearly essential that such sugar be distinguished from sugar not so destined. It is, therefore, the duty of the Secretary, once he has acted to forbid the processing of excess sugar for domestic consumption, to satisfy himself that excess sugar processed in the United States will not be domestically consumed. Such satisfaction cannot, of course, be made to depend upon any arbitrary or capricious determination but the Secretary may require such information, and compliance with such prescribed procedure, as may be reasonably designed to give the necessary assurances as to ultimate use.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 69

ELEVATORS SUBJECT TO COUNTRY GRAIN

ELEVATOR CODE

An elevator which accepts grain under a contract to pay the market price for the same at a future date is not subject to the provisions of Section 5(a) of Article VII of the Country Grain Elevator Code which requires elevators which "store grain for the account of another person" to qualify under state or federal law, or of Section 4 of Article VII which prohibits an elevator from granting free storage.

The same conclusion applies to elevators which do business under future payment contracts which, in addition to the provisions indicated above, provide that in consideration of the buyer agreeing to make settlement at the option of the seller as stipulated in the contract, the seller agrees to pay the buyer at the time of settlement a specified sum per bushel for each day from the time of the execution of the contract until the time of settlement.

Opinion Section Memorandum No. 107 & 107A
Dated July 3 and July 18, 1934.

July 3, 1934.

MEMORANDUM TO MR. ABT

Pursuant to your request, I submit herewith an opinion upon the following:

Question

Is an elevator which accepts grain under a contract to pay the market price for the same at a future date subject to the provisions of Section 5(a) of the Country Grain Elevator Code which requires elevators who "store grain for the account of any other person" to qualify under state or federal law, or of Section 4 of the Code which prohibits an elevator from granting free storage?

Opinion

Sections 5(a) and 4 of the Country Grain Elevator Code are not applicable to an elevator which does business under the future payment form of contract hereinafter set forth more fully.

Statement of Facts

Section 5(a) of the Code provides that "no member shall store grain for the account of any other person without qualifying under (1) United States Warehouse Act, or (2) the warehouse or grain storage laws, if any, of such member's state." Section 4 of the Code prohibits, as an unfair trade practice, "the granting of free storage by any member" with certain stated exceptions.

Certain of the country grain elevators have initiated the practice of accepting the delivery of grain from producers under a contract reciting a present purchase and sale, with an agreement by the elevator to pay the producer the market price of the grain on the date payment is demanded by the producer. The following is typical of the form of such contracts.

"THIS AGREEMENT WITNESSETH:

That the XYZ Company has this day bought and
_____ has this day sold certain wheat,
delivered heretofore to the XYZ Company by said seller
in amounts and grades as follows:

to be paid upon the following basis _____ Kansas market price and discounts in effect on the day payment is demanded by the seller if payment is demanded on or prior to _____. If payment is not demanded on or before _____ payment to be made upon demand of seller on basis of market and discounts on _____. In the event that payment for said wheat shall be demanded by the seller at a time when there is a money stringency or financial panic or in case a large number of customers shall demand payment the same day, the seller agrees to accept a certificate of indebtedness in payment of said wheat due on or before _____ days after said demand. The XYZ Company will carry insurance against fire upon said wheat and all other wheat in its possession and in case of a fire at its warehouse which will destroy its plant and its wheat on hand, the payments shall be made on the basis of the market and discount in effect at _____, Kansas, on the date of said fire.

Witness the hands of the parties at _____, Kansas, the day and year above written.

THE XYZ Company

By _____

The question thus arises as to whether elevators doing business under this type of contract are subject to the aforementioned provisions of the County Grain Elevator Code.

- I. Under a future payment contract, there is a present sale of the grain and Sections 5(a) and 4 of the Code are therefore not applicable.

It is clear that under the type of contract here considered title passes from the producer to the elevator upon the making of the contract. The recitation in the contract of a present purchase and sale is strongly persuasive to this conclusion since the time at which title to the property passes is a matter largely dependent upon the intention of the contracting parties. Ellis & Myers Lumber Co. v. Hubbard, 123 Va. 481, 96 S. E. 754 (1918); Tyler Lumber Co. v. Charlton, 128 Mich 299, 87 N.W. 268 (1901); Uniform Sales Act, Section 18. Even apart from a stipulation that title passes at the time a contract is made, there is a presumption to this effect: Alderman Bros. Co. v. Westinghouse Co., 92 Conn. 419, 103 Atl. 267 (1918); Uniform Sales Act, 19(1). Moreover, where specific goods have been set aside and delivered to the buyer, there is a strong presumption of a transfer of title to the purchaser. Uniform Sales Act, 19, Rule 4(2). Of course, the fact that the seller may fix the date for the payment of the purchase price and thus the amount to be paid may be urged as a reason for holding that title remains in the seller. However, the judicial decisions are clear that if the parties intend that title pass at the time a contract is entered into, it is immaterial that something remains to be done by the seller to ascertain the exact price. Ellis & Myers Lumber Co. v. Hubbard, supra; Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N.W. 828 (1913); I Williston on Sales, (2nd Ed.) Sec. 266.

Where there is a present transfer of title from the vendor to the elevator, I am of the opinion that Sections 5(a) and 4 of the Code are not applicable. If the elevator is owner of the grain, it is storing the same for its own account and not "for the account of any other person." In addition, if title is in the elevator, it is obviously unable to grant free storage to anyone. It is interesting to note that the Attorney-General of the State of Kansas held that an elevator purchasing grain under the form of the contract here considered was not subject to Section 1, Chapter 147, of the laws of Kansas for 1923 requiring all elevators "in which grain is received for storage or transfer and all elevators or warehouses located in the state in which the grain was stored in bulk and doing business for the public" to become licensed under the Warehouse Act of the state. It does not seem that the term "store grain for the account of any other person" is any broader than the term "for storage and transfer" or the term "stored in bulk and doing business for the public." I am, therefore, of the opinion that the ruling of the Attorney-General of Kansas and the reasoning therein is applicable to the Code sections as well as to the statute considered by him.

II. Types of contracts under which an elevator would and would not be subject to Sections 5(a) and 4 of the Country Grain Elevator Code.

For the reasons heretofore set forth, I am of the opinion that where there is a present transfer of title to the elevator at the time the contract is entered into the Code sections are not to be considered applicable. However, under those contracts wherein there is not a present transfer of title, it is my opinion that Sections 5(a) and 4 of the Code apply. A categorical statement of the types of contracts wherein title does or does not pass at the time the contract is made is impossible, since the various courts take different views concerning the nature of contracts containing essentially identical provisions. However, the Uniform Sales Act may be used as a guide in stating general rules concerning the time at which title passes under the various types of contracts. Thus, a contract for "sale or return", presumptively, passes title immediately. Uniform Sales Act, Section 19, Rule 3(1); See also Meyer v. Hodge, 91 Wash. 35, 157 Pac. 42, (1916). While in a contract for "sale on approval or on trial" title, presumptively, remains in the seller until the buyer signifies his approval or acceptance to the seller or does any other act adopting the transaction. Uniform Sales Act, Section 19, Rule 3(2a). See Warren v. Russell, 143 Ark. 516, 220 S.W. 831 (1920).

The question whether an elevator which accepts grain under a conditional sales contract is subject to Sections 5(a) and 4 of the Code merits especial attention. The Attorney-General of Kansas declared that anything less than a present sale and transfer of title to the grain was a storage within the meaning of the Warehouse Act of Kansas. And he further ruled that a conditional sale would be a storage within the meaning of the Act. The Attorney-General cited no authority in support of this conclusion, and I am somewhat in doubt as to whether an elevator entering into a conditional sales contract for the purchase of grain is subject to the Country Grain Elevator Code provisions. Although there

is some authority to the contrary, the majority of the courts now view a conditional sale as in effect a present transfer of title with a mortgage back. Steinert and Sons v. Reed, 118 Me. 403, 108 Atl. 334 (1919); Ratchford v. Cayuga County Warehouse Co., 159 N.Y. App. 525; 145 N.Y. 83 (1913). Moreover, in a conditional sale the risk of loss or gain is upon the buyer. Jessup v. Fairbanks, 38 Ind. App. 673, 78 N.E. 1050(1906); O'Neil-Adams Co. v. Eklund, 89 Conn. 232, 93 Atl. 524(1915); Uniform Sales Act, Section 22(a); Uniform Conditional Sales Act, Section 27. For these reasons it appears entirely possible to view an elevator storing grain under such a contract as storing it for its own account rather than for the account of any other person. If an elevator stores grain for its own account, it is obviously not granting free storage to anyone.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

July 18, 1934.

MEMORANDUM TO MR. KING

On July 3 last, I submitted an opinion to Mr. Abt on the question whether an elevator which accepts grain under a contract to pay the market price for the same on the date payment is demanded by the seller is subject to the provisions of Sections 4 and 5 (a) of Article VII of the Country Grain Elevator Code. Pursuant to your oral request, I submit herewith a supplementary memorandum on the applicability of the sections of the code to future payment contracts which, in addition to the provisions contained in the contracts considered in the previous memorandum, provide that in consideration of the buyer agreeing to make settlement at the option of the seller as stipulated in the contract, the seller agrees to pay the buyer at the time of settlement a specified sum per bushel for each day from the time of contracting until the time of settlement.

OPINION

Sections 4 and 5 (a) of Article VII of the Country Grain Elevator Code are not applicable to an elevator which does business under the future payment form of contract herein considered.

DISCUSSION

The future payment contracts presented for consideration, after reciting a present transfer of title, set forth provisions of which the following are typical:

"On May. 1, 19....., or prior thereto upon demand of the seller, and upon surrender of this contract receipted in full, the buyer promises to pay to the seller, at the above named elevator, for said wheat the market price at said elevator on the date last named above or on the date prior thereto on which demand may be served upon the buyer by the seller, as the case may be, for wheat of like grade and quality, subject to the discounts herein agreed upon.

"In consideration of the buyer agreeing to make such settlement at the option of the seller as stipulated above, the seller agrees to pay to the buyer, at the time of settlement, the sum of 1 cent per bushel for the first days from the date first above named, or fractional part thereof, and per day thereafter until time of settlement."

Notwithstanding the above-quoted provisions relative to the method and amount of payment under the contract, I am of the opinion that title passes from the seller to the elevator at the time of the

making of the contract. It is a well-established rule that where the goods are ascertained title in them passes at such time that parties to a contract intend it to be transferred. Ellis & Myers Lumber Co. v. Hubbard, 123 Va. 481, 96 S.E. 754 (1918); Tyler Lumber Co. v. Charlton, 128 Mich. 299, 87 N. W. 268 (1901). The rule is stated in Section 18 of the Sales Act, as follows:

"Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."

That it was the intention of the parties that there should be a present transfer of property in the goods appears unquestionable. The fact that the price has not yet been definitely ascertained does not prevent the present passage of title. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828 (1913); I Williston on Sales (2d Ed.), §266. The further fact that the buyer agrees to pay the seller an additional amount in consideration of the buyer agreeing to make settlement at the option of the seller and that the amount of this payment varies according to the number^{or} bushels of grain sold and the length of time until settlement would not prevent a present passage of title.

If there is a transfer of title from the seller to the elevator company, it seems clear that the elevator is not subject to the restrictions of Section 5 (a) of Article VII of the Country Grain Elevator Code providing that "no member shall store grain for the account of any other person without qualifying under (1) U. S. Warehouse Act, or (2) the section of the Grain Storage Laws, if any, of such member's state". If the elevator possesses title, it is obviously storing the grain for its own account and not "for the account of any other person". Moreover, it is clear that Section 4 of Article VII of the code is not applicable to the contracts here considered. If title is in the elevator, it appears impossible for it to grant free storage to anyone. Furthermore, the contract provision whereby the seller agrees to make payment to the buyer in consideration of the buyer granting an option to the seller appears to be an indirect means of paying storage rather than a method by which a party is freed from the obligation of paying storage.

Francis M. Shea,
Chief of the Brief and Opinion Section,
Office of the General Counsel.

No. 70

USE OF AUDITS OF BOOKS OF MILK
DISTRIBUTORS

Audits of distributors' books made pursuant to agreements and/or licenses under the Agricultural Adjustment Act may not be placed at the disposal of the Federal Trade Commission by the Secretary on his own motion; but, in so far as they relate to corporations within the scope of the investigatory powers of the Federal Trade Commission, they may be turned over to the Commission by the Secretary, upon the direction of the President.

Opinion Section Memorandum No. 108
Dated July 3, 1934.

July 3, 1934

MEMORANDUM TO MRS. PRESSMAN

In reply to your memorandum of June 29, 1934, I submit my opinion upon the following:

Question

May the Secretary place at the disposal of the Federal Trade Commission, for use in connection with the investigation by the Commission of conditions with respect to the distribution of milk, audits of distributors' books made pursuant to agreements and/or licenses under the Agricultural Adjustment Act?

Opinion

Such audits, if confidential under the terms of the agreements and/or licenses by which they were obtained, may not be placed at the disposal of the commission by the Secretary on his own motion; but, in so far as they relate to corporations within the scope of the investigatory powers of the Federal Trade Commission, they may be turned over to the Commission by the Secretary, upon the direction of the President.

Conditions Under Which the Audits Were Obtained

Section 8 (4) of the Agricultural Adjustment Act confers upon the Secretary power:

"To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof, and as to trade practices and changes, and to keep such systems of accounts as may be necessary for the purpose of part 2 of this title."

No general requisition of information from licensees has been made by the Secretary under the authority thus granted, but various provisions have been incorporated in licenses issued by the Secretary pursuant to the terms of Section 8 (3), as well as in marketing agreements entered into pursuant to Section 8 (2). These provisions are not uniform, and those which are quoted below, taken from the Des Moines Marketing Agreement and License for Milk (Agreement No. 19, License No. 13) are set forth as illustrative only. The provision in the Marketing Agreement is as follows:

"The Contracting Producers and the Contracting Milk Dealers shall severally maintain systems of accounting which shall accurately reflect the true accounts and conditions of their respective businesses. Their respective books and records (including the books and records of all their subsidiaries and affiliates), shall, during usual hours of business, be subject to the examination of the Secretary, to assist him in the furtherance of his duties with respect to this Agreement, including verification by the Secretary of the information furnished on the form hereinafter referred to. The Contracting Producers and the Contracting Milk Dealers shall severally, from time to time, furnish information to the Secretary on and in accordance with forms to be supplied by him. All information obtained by or furnished to the Secretary pursuant to this paragraph, shall remain the confidential information of the Secretary, and shall not be disclosed by him except upon lawful demand made by the President, by either House of Congress, or any committee thereof, or by any court, or in connection with any proceeding taken in the enforcement of this Agreement or any license issued pursuant to said Act."

In the license the last sentence is somewhat expanded and reads as follows, the additional matter being underlined:

"All information (unless it would have been otherwise legally obtainable by the Secretary) obtained by or furnished to the Secretary pursuant to this paragraph, if designated in writing as confidential when so obtained or furnished, shall remain the confidential information of the Secretary and shall not be disclosed by him except upon lawful demand made by the President, by either House of Congress or any committee thereof, or by any court, or in connection with any proceeding taken in the enforcement of this license, or when offered in evidence in any hearing, authorized by the Act or otherwise, for the suspension or revocation as to one or more persons of any license issued by the Secretary, whether or not such information was obtained from or furnished by the person or persons with respect to whose license the hearing is held."

For the purposes of this memorandum, it will be assumed that the audits in question were designated as confidential when obtained and that, except for the marketing agreements or licenses, they would not have been legally obtainable.

(1)

Under the terms of the license, the Secretary may not on his own motion place the audits at the disposal of the Federal Trade Commission, but he may do so upon the direction of the President.

Under the terms of the typical license quoted above, any information obtained or furnished to the Secretary pursuant to its provisions, if designated as confidential when obtained, is to remain "the confidential information of the Secretary". It is obvious that a literal construction of this provision is not feasible and that by "Secretary" must be meant not alone the Secretary but such officers and employees in the Department of Agriculture as would necessarily be required to share such information in the course of their official duties. This was recognized in the license itself, as well as in the marketing agreement, which provides that the Secretary may make (and in the case of the Agreement that the Secretary agrees to make) regulations and prescribe penalties to be imposed "in the event of any violation of the confidences or trust imposed hereby".

Pursuant to this provision, and pursuant to the authority conferred upon him by Section 10 (c) of the Act to make regulations "necessary to carry out the powers vested in him" by the Act, the Secretary on October 9 issued General Regulations providing penalties for the divulgence of confidential information.

Article 1, Section 100 (f), of those Regulations defines "confidential information" in terms which would embrace audits of the kind now under consideration.

"The term 'confidential information' means all facts relating to the business of any person which have been specifically designated in writing by such person as confidential at the time when obtained by or furnished to the Secretary, and to which the Secretary would not otherwise be entitled were it not for the provisions of a license or a marketing agreement entered into under Section 8 (2) of the Act."

By Article II, Section 200, the following persons are declared liable to a penalty to be imposed by the Secretary:

"Any officer, employee, agent, or expert of the Department who shall wilfully divulge or make known in any manner any confidential information regarding the business of any person which may come to the knowledge of such officer, employee, agent, or expert through an examination or inspection of the books and records of such person or in any other manner, except to other officers, employees, agents, or experts of the Department who may be entitled to have such knowledge in the regular course of their official duties, or except upon lawful demand made by the President, by either House of Congress or any committee thereof, or except as he may be required by subpoena or other legal process to testify as to the same in a court of competent jurisdiction or except as he may be required to testify in any hearing, authorized by the Act, or by Regulations issued pursuant thereto, for the suspension or revocation of the license of the person from whom such information was obtained or by whom it was furnished,**"

It is thus apparent that no impediment has been placed either by the licenses or by the Regulations upon the furnishing of "confidential information", as defined in the Regulations, to other officers, employees, etc. of the Department "who may be entitled to have such knowledge in the regular course of their official duties." To be within the terms of the license any divulging of confidential information beyond these limits must be brought within the exceptions specified.

Of these exceptions the following only are pertinent, and these are common to licenses and to marketing agreements alike:

"Upon lawful demand made by the President, by either House of Congress or any committee thereof..."

In the present case there is no demand, but a mere request on the part of the Federal Trade Commission which seeks the information required by the Secretary to use in connection with the investigation it is making of the sale and distribution of milk. That investigation is undertaken pursuant to H. Con. Res. 32, passed by the 73d Congress, by which the Federal Trade Commission is "authorized and directed to investigate conditions with respect to the sale and distribution of milk and other dairy products" with a view to determining particularly whether operations are being conducted in restraint of trade, or by the aid of unfair trade practices, or "to depress the price of milk sold by producers". The resolution is merely directory and confers no powers upon the Commission. Its authority, if such exists, to require information from other departments of the government must be found within the terms of the statutes.

Express provision for the furnishing of information by the several departments is found in Section 8 of the Federal Trade Commission Act (Section 48, 15 U.S.C.A.):

"The several departments and bureaus of the Government when directed by the President, shall furnish the Commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the Commission as he may direct."

It is unnecessary to consider whether, under this provision, the President might direct the furnishing to the Commission of information obtained under the terms of a license specifying that it should be kept confidential by the Secretary for all purposes, because each license, and each marketing agreement as well, expressly exempts all information from the requirement of confidential treatment in case of "lawful demand by the President." As to the proper construction of what constitutes "a lawful demand by the President", the license itself provides no clue. It may be construed to include any demand by the President not in contravention of any statute, or it may be construed more narrowly, as including only demand made pursuant to express statutory authority. Under either construction a direction by the President pursuant to Section 8 of the Federal Trade Commission Act must be regarded as a

"lawful demand," and as fulfilling exactly the description of the exception provided for in the license.

The scope of such demand, pursuant to Section 8 of that Act, is necessarily limited by the terms of the Section to information "relating to any corporation subject to any of the provisions of this Act". The term "corporation", as defined in the Federal Trade Commission Act means

"any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members." (Sec. 4, 38 Stat. 719, Sec. 44, 15 U.S.C.A.)

It has been held that the investigatory powers of the Commission under Section 6 of the Act are limited to corporations engaged in interstate commerce. U.S. v. Basic Products Co., 260 Fed. 472 (D.C.Pa.1919), but see Federal Trade Commission v. Smith, 1 F. Supp. 247 (1932), holding that practices of a holding company with respect to subsidiaries engaged in interstate commerce may be investigated. Cooperative associations may be the subject of investigation with reference to alleged restraints of interstate trade and commerce. 34 Op. Atty. Gen. 553, 564 (1925).

Assuming that the term "corporation" as used in Section 8 of the Federal Trade Commission Act is subject to the same limitations as when used in Section 6, it nevertheless appears that it is broad enough to embrace most, if not all, of the corporations and associations, audits of whose books have been made pursuant to the terms of licenses issued under the Agricultural Adjustment Act. The provisions of such Section for furnishing information to the Commission upon the direction of the President therefore appear to furnish an ample and appropriate procedure for making available to the Commission the desired audits.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 71

FILING OF CROSS BILLS IN THE FEDERAL
COURTS

Federal Equity Rule 30 has apparently not abolished the cross bill in all situations but only in those in which a defendant seeks affirmative equitable relief arising out of the transaction which is the subject matter of the suit.

Ordinarily a cross bill may not be filed before the answer, but a court may, under appropriate circumstances, permit a cross bill to be so filed.

The rules in the various districts differ as to the requirements of leave to file a cross bill.

Opinion Section Memorandum No. 110
Dated July 5, 1934.

July 5, 1934.

MEMORANDUM TO MR. BACHRACH

In answer to your request for an opinion, I herewith submit the following:

QUESTION

- (a) Does the Equity Rule, indicating that an answer may include matters of counter-claim, abolish cross-bills?
- (b) If it does not, need the answer be filed before the cross-bill or can it be filed afterwards?
- (c) Is leave of court required to file a cross-bill?

OPINION

(a) It is not wholly clear whether the Federal Equity Rule referred to - Rule 30 - abolishes the cross-bill in all situations. It seems that it has not done so but has only abolished cross-bills in those situations in which a defendant seeks affirmative equitable relief arising out of the transaction which is the subject matter of the suit.

(b) Ordinarily a cross-bill cannot be filed before the answer. But it seems that a court may under circumstances permit a cross-bill to be so filed.

(c) The rules in the various districts differ as to the requirement of leave to file a cross-bill.

DISCUSSION

1.

It Is Not Wholly Clear Whether the Federal Equity Rule Referred to - Rule 30 - Abolishes the Cross-Bill In All Situations. It Seems That It Has Not Done So But Has Only Abolished Cross-Bills in Those Situations

In Which a Defendant Seeks Affirmative Equitable Relief
Arising Out of the Transaction Which Is the Subject
Matter of the Suit.

Federal Equity Rule 30 reads as follows:

"The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set up any set-off or counter-claim against the plaintiff, which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims."

The Rule thus does not specifically effect an abolition of the cross bill.

However, under the former equity practice, and before the adoption of this Rule in 1912, the cross-bill was the only way by which a defendant could obtain any affirmative relief in the action, other than a dismissal of the bill. Nelson v. Lowndes Co., 93 Fed. 538 (C.C.A. 5th, 1899). But affirmative relief (the Rule employs the term "counter-claim"), which arises "out of the transaction which is the subject matter of the suit", now "must" be set up by way of answer. It thus is clear that at least as to such matters the cross-bill has been abolished, and the counter-claim contained in the answer has taken its place.

As to the matters referred to in the latter part of the Rule, however, there is considerable doubt as to whether they may still be set up by cross-bill. With such matters, - "any set-off or counter-claim against the plaintiff, which might be the subject of an independent suit in equity" - the Rule employs the permissive word "may" with reference to their being set up in the answer. And in permitting such practice, the Rule states that they "may" so be set up "without cross-bill". Whether the permissive word "may", together with the phrase "without cross-bill", meant to give to the defendant an option to still use the cross-bill, or whether the option is one to set up such matters either in the answer or by an independent suit in equity, is not clear. That the defendant is given an option as to the transactions mentioned in the second part of the Rule is clear. In accordance with a well-settled rule of statutory construction, the word "may" will be construed as permissive, especially so when words of mandatory import have been employed in the same provision. Farmers Bank v. Federal Reserve Bank, 262 U.S. 649 (1923). But whether the option includes the cross-bill is not clear.

Nor do the cases help in clearing up the ambiguity. No case has squarely presented the problem whether the Rule has abolished the cross-bill. In some general and rather loose discussions pertaining to the Rule, some dicta may be quoted to the effect that it has had the effect of abolishing the cross-bill. For instance, the court in the case of

Hines v. Martin, 286 Fed. 653 (C.C.A. 5th, 1923), in considering whether the lower court had abused its discretion in refusing defendant the right to amend his answer, also stated:

"Recognizing fully that a cross-bill in equity is neither needed nor permitted in a suit in equity in a Federal court, * * *" (p. 656, Underscoring supplied).

Likewise, in Marconi Wireless Co. v. Natl. E.S. Co., 206 Fed. 295 (Dist. Ct. N.Y., 1913), the court had before it the problem of whether a counter-claim which had been filed by the defendant was of the kind that could be properly considered by the court. This problem, of course, also necessitates an interpretation of Rule 30, and in construing the Rule for this purpose, the court stated:

"The new Rule 30 not only does away with a cross-bill, but says that 'without cross bill' any claim which could be the subject of an independent equity suit shall be set out in the answer with the same effect as a 'cross-suit', so as to allow a 'final judgment' on the 'original' and 'cross-claims'. Here we have a deliberate use of new terms covering any 'independent suit in equity' to have the result of a 'cross suit', and yet to be pleaded 'without cross-bill' (which is seemingly recognized as the old way of pleading)." (p. 302. Underscoring supplied).

And in Terry-Turbine Co. v. Sturtevant Co., 284 Fed. 103 (Dist. Ct. Mass. 1913), in which the court was also faced with the problem of determining whether the counter-claim contained in the answer was a proper one, the court remarked;

"The main purpose which the quoted part of rule 30 (the material containing the clause 'may without cross-bill etc.') was intended to accomplish is evident. It is to dispense with cross-bills, by requiring everything previously done by cross-bill to be thereafter done by answer only." (pp. 104, 105. Underscoring supplied).

However, other conclusions may also be drawn from the cases. In Amer. Mills Co. v. Amer. Surety Co., 260 U.S. 360 (1922), the problem before the court was whether the affirmative relief defendant sought came within the "must" or "may" category, because the issue involved was one of waiver. In discussing this problem, Judge Taft stated:

"That which grows out of the subject-matter of the bill must be set up in the interest of an end of litigation. That which does not may be set up if the defendant wishes in one proceeding in equity quickly to settle all equitable issues capable of trial between them in such a proceeding, even though they are not related. The formality of cross-bills is not required.***" (p. 365. Underscoring supplied).

The last sentence can be construed to infer that although not re-quired, yet they are permissible if a pleader wishes to trouble himself with the formalities involved therein.

Further, there have been many cases arising after the adoption of the Rule in 1912 in which defendants have interposed cross-bills. Many courts after 1912 have employed the term "cross-bill" as synonymous with "set-off" or "counter-claim" contained in the answer, and the fact that the courts in such cases have employed the term "cross-bill" is of little significance because there was no such independent pleading filed in the case. This the courts did in the following cases since 1912:

Automotive Prod. Corp. v. Wolverine Co., 15 Fed. (2nd) 745 (C.C.A. 6th, 1926)
Grossman v. United States, 280 Fed. 683 (C.C.A. 7th, 1922).
Looney v. Thorpe Bros., 277 Fed. 367 (C.C.A. 8th, 1921).
Mathis v. Ligon, 39 Fed. (2nd) 455 (C.C.A. 10th, 1930).
Queen Ins. Co. v. Citro, 58 Fed. (2nd) 107 (C.C.A. 7th, 1932)
Smith Eng. Co. v. Pray, 58 Fed. (2nd) 926 (C.C.A. 9th, 1932)
Victor Talking Mach. Co. v. Brunswick Co., 279 Fed. 758,
 (Dist. Ct. Del. 1922)
Wootton Land Co. v. Ownbey, 265 Fed. 91 (C.C.A. 8th, 1920).

But the following is a complete list of all cases reported since 1912 in which a pleading termed a "cross-bill", independent of the answer and in addition thereto, has been filed and accepted by the courts:

Amer. Car Co. v. Merchants Trans. Co., 216 Fed. 904
 (Dist. Ct., N.Y. 1914)
Barnett v. Kunkle, 256 Fed. 644 (C.C.A. 8th, 1919) app.
 dis. 264 U.S. 16.
Fed. Coal Co. v. Liberty Coal Co., 23 Fed. (2nd) 674,
 (C.C.A. 6th, 1928).
Hyde v. Blaxter, 299 Fed. 167 (C.C.A. 8th, 1924)
Lovell v. Latham & Co., 211 Fed. 374 (Dist. St. Ala., 1914),
 Mod. 219 Fed. 721, aff'd. 242 U.S. 426.
Magnolia Pet. Co. v. Suits, 40 Fed. (2nd) 161 (C.C.A. 10th,
 1930).
Quinlivan v. Dail Co., 274 Fed. 57 (C.C.A. 6th, 1921).
United States v. Archibald, 4 Fed. (2nd) 587 (Dist. Ct.
 N.Y., 1925).
United States v. Duignan, 4 Fed. (2nd) 983 (C.C.A. 2nd,
 1925), aff'd. 274 U.S. 195.
Wilcox v. El Banco, 255 Fed. 442 (C.C.A. 1st, 1918) app.
 dis. 255 U.S. 72.
Woods v. United States, 223 Fed. 316 (C.C.A. 8th, 1915).

Also in the case of Landon v. Public Utilities Comm., 234 Fed. 152 (Dist. Ct. Kans., 1916), (Rev'd. on other grounds 249 U.S. 236, mod. 240 U.S. 590), an intervening bill was filed, and the court stated:

"This intervening bill, which we treat as a cross-bill
 * * *". (p. 168)

It may be argued that the courts, in accepting such cross-bills as pleadings, have recognized the appropriateness of their use. In these cases the courts have not only accepted these independent pleadings labeled "cross-bills" but also have considered and sustained them. When not sustained, it has not been because they have been considered as improper pleadings under the new equity rules, but for other reasons, such as for lack of equity. See Lovell v. Latham & Co., *supra*. It is true that no court since 1912 seems to have found it necessary to make a square ruling on the point of striking out any of the cross-bills which have been filed by defendants on the grounds that such pleadings are no longer permitted in modern equity practice because of Rule 30. But at least no court has done so sua sponte.

The differences in the opinions of the recognized text writers in this field as to whether the Rule abolishes the cross-bill also reflect the ambiguity of the Rule. It is the conclusion of Foster, for instance, that the Rule has abolished the cross-bill as a pleading. Foster, Cyclopedia of Federal Procedure, Sec. 879. But Hughes, on the other hand, states:

"Equity Rule 30 provides an adequate substitute for the cross-bill, but does not apparently prohibit resort to that form of seeking affirmative relief." (Hughes, Federal Practice, Vol. 2, Sec. 1258, p. 413).

And the Annotator in the U.S.C.A. is in agreement with Hughes:

"Equity Rule 30 provides an adequate and less technical substitute for the cross-bill, but does not apparently prohibit resort to that form of seeking affirmative relief." (28 U.S.C.A., Sec. 723, Note 491, p. 191).

It is, of course, clear that there is no longer any necessity whatsoever of resorting to the device of the cross-bill. Anything that could formerly be done by cross-bill can now, because of Rule 30, be done by way of answer, by setting up therein appropriate counter-claims or set-offs. As the court stated in Churchward Int'l. Co. v. Bethlehem Steel Co., 233 Fed. 322 (Dist. Ct. Pa., 1916):

"***rule 30 permits defendants by answer to make any counter complaints against plaintiffs which might be made the subject of a bill and relieves them of the necessity of resorting to a cross-bill," (p.323).

And the court in Automotive Prod. Corp. v. Wolverine Co., 15 Fed. (2nd) 745 (C.C.A. 6th, 1926) also declared:

"By Equity Rule 30, cross-bills have become unnecessary * * *." (p. 747).

Hines v. Martin, 286 Fed. 653 (C.C.A. 5th, 1923) is to the same effect:

"All affirmative relief necessary to be sought by a cross-bill under the former rules of equity practice

can now be obtained through an answer in equity framed for that purpose." (p. 656).

Thus, the Rule neither specifically abolishes the cross-bill, nor has any case so flatly held to be its effect. And because so many courts have since the adoption of the Rule accepted such pleadings, - no court rejecting any cross-bill on the grounds that it is no longer permitted - it would seem that the use of the cross-bill as a pleading is still permitted.

Equity Rule 18 also possibly merits consideration in this connection. This Rule reads as follows:

"Unless otherwise prescribed by statute or these rules, the technical forms of pleadings in equity are abolished."

But this Rule has never been construed to have had any effect upon the continuation of the existence of the cross-bill, or, in fact, upon any specific equity pleading. The only case in which any problem pertaining to cross-bills has been associated with this Rule is Wilcox v. El Banco, 255 Fed. 442 (C.C.A. 1st, 1918). In that case the lower court rejected a cross-bill filed by the defendant on the grounds that it "did not answer the requisites of such a bill when tested by the technical rules of pleading in equity." But the Court of Appeals held, citing this Rule 18, that there was no reason why the District Court "should not have regarded it as an answer and decided whether the defense set up * * * presented a valid defense." (p. 446). Thus the court concluded that the effect and purpose of Rule 18 was primarily to have any technical errors or defects disregarded:

"In other words, it seems to us that the purpose sought to be accomplished by the general equity rules is that, if the substantial rights of the parties may be ascertained and determined according to the allegations contained in the pleadings, it is the duty of the court to consider and decide them without regard to the form in which they are presented, if they may be rightly understood. (Wilcox v. El Banco, supra, at p. 446)

And it is only in this respect that Rule 18 has been cited and employed. For instance, in Activated Sludge Co. v. Sanitary Dist. of Chicago, 33 Fed. (2d) 452 (C.C.A. 7th, 1929), the court cited Rule 18 in support of its holding that it was immaterial that plaintiff had entitled his action erroneously. And in Williams v. Pope, 215 Fed. 1000 (Dist. Ct. N.Y., 1914) the court upheld a complaint drafted by a layman, citing Rule 18, and holding it sufficient in spite of its many deficiencies. Likewise in Sheeler v. Alexander, 211 Fed. 544 (Dist. Ct. Ohio, 1913), the court overruled a contention that a bill of review had not been filed strictly in accordance with proper procedure, citing Rule 18, among other rules, and (stating: A.C. 1913, p. 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 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2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2

"It would seem to be the spirit of these new equity rules, that they were drawn by the Supreme Court with the intent of leaving the judge free to adjust matters in the interests of substantial justice, as he sees it, unhampered by precedent and by technical definitions and distinctions." (p. 545).

Thus it would seem that Equity Rule 18 could not reasonably be construed to have had the effect of abolishing the cross-bill, but that rather it was adopted merely to do away with technical defects and errors in the interests of effecting substantial justice.

Furthermore, it will be noted that the Rule effects its aboli-tions "unless otherwise prescribed by these rules." If the effect of Rule 30 is correctly construed to be such as to perpetuate the propriety of the use of the cross-bill, then Rule 30 would fall within the excep-tion provided in Rule 18.

II.

Ordinarily a Cross-Bill Cannot Be Filed Before the Answer. But It Seems That a Court May under Certain Circumstances Permit a Cross-Bill To Be So Filed.

Correct practice seems to require that a cross-bill cannot be interposed unless the complaint in the action has been answered.

In the early case of Allen v. Allen, Fed. Cas. No. 18, 223 (Superior Ct. Territory Ark., 1828), plaintiff filed a bill for divorce. The defendant, instead of answering the complaint, filed a cross-bill, also asking for a divorce, and alimony. But the court held:

"This was clearly irregular. The bill should have been answered and the allegations therein contained contested before the cross-bill could be properly filed."

However, in No. R. Co. v. Ogdensburg & L. C. R. Co., 20 Fed. 347 (Circ. Ct. N.H., 1884), plaintiff sued on a contract. Defendant by cross-bill sought a reformation of the contract. Both parties to the suit consented to have the issue concerning the reformation first settled by the cross-bill, instead of the defendant bringing up the reformation of the contract by way of answer to the original bill. The court, therefore, gave permission to the defendant to file the cross-bill before answering the complaint.

The above two cases seem to be the only ones dealing with the problem of whether a cross-bill can properly be filed before answer. From them, it would seem that although it ordinarily would be considered irregular practice to file the cross-bill before the answer, a court, nevertheless, has power to permit such procedure if it so sees fit.

III.

The Rules in the Various Districts Differ as to
the Requirement of Leave to File a Cross-Bill.

The practice in some of the Districts seems to be to require leave before a cross-bill can be filed. However, in other Districts, securing leave to file such a bill has not been held to be necessary.

In Christmas Gold Mining Co. v. Milliken, 200 Fed. 316 (D.C. Colo., 1912), plaintiff made a motion to strike a cross-bill of a defendant "upon the ground that it was filed without leave of court." The court denied the motion, stating:

"The cross-bill is by a party to the suit, and was filed seasonably - indeed, contemporaneously with the answer. Leave of court is not necessary under such circumstances. Neal v. Foster (C.C.) 34 Fed. 496; New York Co. v. Borough of North Arlington (N.J. Ch.) 75 Atl. 177; Beauchamp v. Putnam, 34 Ill. 379, 381; 1 Bates, Fed. Proc. Sec. 381." (p. 316).

The court went on to distinguish the case of Bronson v. LaCrosse R. R. Co., 69 U.S. 283 (1863), - a case which has been cited in support of the contention that leave of court is required before a cross-bill can be filed. It admitted that in that case it was true that a cross-bill filed without leave of court was set aside as irregular. However, it pointed out that the cross-bill was there filed by a person who was not even a party to the suit. This person petitioned the court for leave to file an answer for a corporation of which he was a stockholder, which corporation was then in default in its pleading. In his petition for leave to file an answer for the corporation, he also asked leave to file a cross-bill. The court gave him leave to file the answer, but its order made no provision for the cross-bill. However, the petitioner filed a cross-bill with his answer anyway. Thereupon, the court set it aside, and its action was held not to be reversible error by the Supreme Court. The court in the Christmas case, supra, further pointed out that in the case of Indiana Railroad Co. v. Liverpool Co., 109 U.S. 168, a defendant sought to file a cross-bill after an order pro confesso had been entered against him, and after a reference in the case had already been had. In such late circumstances the Supreme Court held that "it was discretionary with the court to permit the filing of the cross-complaint." (p. 317).

The court in the Christmas case did take cognizance, however, of the practice which seems to have grown up in some districts to secure leave to file a cross-bill:

"The procedure seems, it is true, to have been indulged in a number of districts to secure leave. Mercantile Trust Co. v. Missouri, etc., Ry. Co. (C.C.) 41 Fed. 8, 11; Brush Co. v. Brush-Swan Co. (C.C.) 43 Fed. 701; International Tooth Co. v. Carmichael (C.C.) 44 Fed. 350; Huff v. Bidwell, 151 Fed. 566, 81 C.C.A. 43; Underfeed Stoker Co. v. American Stoker Co. (C.C.) 169 Fed. 892." (p. 317)

But it pointed out:

"... seems to have resulted from local practice rather than from the ancient procedure in equity." (p. 317)

It therefore held:

"Whatever may be the necessity, therefore, for leave where it is sought to file a cross-bill out of season, such rule can have no application where, as here, the cross-bill is filed by a party to the suit and with his answer." (p. 317)

Neal v. Foster, 34 Fed. 496 (Circ. Ct. Ore., 1888), is another case which holds that permission to file a cross-bill is not necessary:

"It was not necessary to give notice of the application for leave to file a cross-bill; nor, so far as I am advised, to obtain leave for doing so. * * * A cross-bill is a regular and legitimate proceeding in a court of equity, to which any party defendant may resort in a proper case, without any special leave of the court." (p. 498. Underscoring supplied).

The Neal case goes so far as to hold that it is proper to file a cross-bill without leave even after the trial, but before the final disposition of the case, in spite of the oft-repeated statement that a cross-bill can not be filed after trial:

"It is generally stated in the books that a cross-bill must be filed before publication, - that is before the taking of testimony in the original case is closed and the same opened to the inspection as of the parties or published, - unless where some new matter, as a release, arises afterwards, or the case appears at the hearing too imperfect to reach and settle the rights of all the parties." (p. 499).

But the court pointed out that the requirement that a cross-bill must be filed before trial was based on old equity practice. In modern equity practice, however:

"there is no longer any secrecy in the premises, and there is now no reason why the period or fact of publication should be arbitrarily prescribed as the point of time beyond which a cross-bill cannot be filed. The court may, sua sponte, direct the filing of a cross-bill when it appears necessary to a complete determination of the case, at any time before final decree; and in my judgment, there ought to be no fixed rule against a defendant's filing a cross-bill in the proper case before the final hearing; the objection of laches being disposed of in each case on the particular circumstances thereof, ***" (p. 499. Underscoring supplied).

But in Huff v. Bidwell, 151 Fed. 563 (C.C.A. 5th, 1907), five years and several months after the complaint was filed, and after the case had already been tried and the opinion of the court rendered, certain defendants asked leave to file a cross-bill. The court refused permission and the court's action was assigned as error. The Court of Appeals, however, in holding that the court properly used its discretion in refusing to allow the filing of the bill in such a case stated:

"When a cross-bill is necessary to the complete determination of the matters already in litigation, the court may permit one to be filed at any time before the hearing. To grant or to refuse permission to file a cross-bill is largely in the discretion of the court.***. The courts generally disapprove of the filing of a cross-bill after the original suit has been heard and the merits have been passed on." (p. 566).

Rogers v. Riessner, 31 Fed. 591 (Circ. Ct. S. D. N.Y., 1887), is another case in which a defendant moved for leave to serve a cross-bill after the case had already been heard and a decree rendered. His motion was denied on the grounds that it was made too late. Thus, at least when the cross-bill is not seasonably filed, its acceptance seems to be entirely within the court's discretion. Morgan's Co. v. Texas Central Railway, 137 U.S. 171.

"This bill was filed on leave, before the testimony was taken, and though there should be as little delay as possible in filing bills of this kind, yet that was a matter entirely within the discretion of the court, which could have directed it to be filed even at the hearing." Morgan's Co. v. Texas Central Railway, supra, at p. 201.

Thus, while it does not seem as if permission need be secured in some districts before the cross-bill is filed, if it is filed seasonably, such as with the answer, and by a party to the case, yet, as the court noted in the Christmas case, supra, the practice seems to have grown up in many districts to secure leave before filing a cross-bill. In addition to the cases cited in the Christmas case, supra, leave was secured in Dickerman v. Northern Trust Co., 80 Fed. 450, aff'd. 176 U.S. 181, 1900, and in Moore Printing Co. v. National Savings Co., 218 U.S. 422 (1910). Furthermore, in Indiana Manufacturing Co. v. Nichols Co., 190 Fed. 579 (Circ. Ct. E. D. Mich., 1911) plaintiff objected to a cross-bill because it was filed without leave. The court stated:

"The cross-bill was filed without leave, and is irregular in that respect; but an order may now be entered granting, nunc pro tunc, leave to file same." (p. 588. Underscoring supplied).

And the court in Osborne v. Barge, 30 Fed. 805 (Circ. Ct. N.D. Ia., 1887) did likewise, granting leave after plaintiff objected to the defendant's filing a cross-bill without leave.

It thus seems as if the matter of securing leave to file a cross-bill is one to be governed by local practice. If the local rule is not well settled, it would seem best to avoid any possibility of difficulty by first securing leave to file the bill.

Francis M. Shea,

Chief, Brief & Opinion Section,

No. 72

APPOINTMENT OF BUREAU OF AGRICULTURAL
ECONOMICS AS AGENT OF THE SECRETARY

It appears to be within the power of the Secretary of Agriculture to appoint the Bureau of Agricultural Economics as his agent to receive reports required by the License for Peanut Millers, issued under Section 8(3) of the Agricultural Adjustment Act; however, the designation of the chief or of some other official of the Bureau to act as the agent of the Secretary is recommended as the safer procedure.

Opinion Section Memorandum No. 128
Dated July 6, 1934.

July 6, 1934.

MEMORANDUM TO MR. OPPENHEIMER

Pursuant to your request, I submit herewith an opinion upon the following question.

QUESTION

May the Secretary of Agriculture designate the Bureau of Agricultural Economics as his agent to receive reports which Section 4, Article V of the Marketing Agreement and Section 4, Article IV of the License for Peanut Millers require each miller to furnish to the Secretary?

OPINION

I am of the opinion that the Secretary of Agriculture may appoint the Bureau of Agricultural Economics as his agent. However, the designation of the Chief or some other official of the Bureau is recommended as the safer procedure.

STATEMENT OF FACTS

Section 4, Article V of the Marketing Agreement and Section 4, Article IV of the License for Peanut Millers contain identical provisions, to wit:

"Each Miller shall, from time, to time, upon the request of the Secretary, report to the Secretary the quantity of farmers' stock peanuts on hand whether owned or stored for others, and the quantity of raw shelled and/or cleaned peanuts on hand or stored for others.

Moreover, Article XV of the agreement and Article IX of the license both provide:

"The Secretary may by a designation in writing, name any person, including any officer or employee of the Government, to act as his agent in connection with any of the provisions of this Agreement."

The General Crops Section desires that the Bureau of Agricultural Economics be designated as the Secretary's agent to receive the reports required under the sections quoted supra. The narrow question is thus presented as to whether the Bureau of Agricultural Economics comes within the meaning of the words "any person, including any officer or employee of the Government."

- I. The term "any person, including any officer or employee of the Government" is broad enough to include the Bureau of Agricultural Economics.

The general rule as to the interpretation to be placed upon the word "person" is well stated in the case of Commonwealth v. Welosky, 276 Mass. 398, 177 N.E. 656 (1931). The court therein declared at page 659:

"The word 'person,' like many other words, has no fixed and rigid signification; but has different meanings dependent upon contemporary conditions, the connection in which it is used, and the result intended to be accomplished. * * * The word 'person' may include a national bank, Central National Bank v. Lynn, 259 Mass. 1, 14, 156 N.E. 42; a corporation, McDonnell v. Berkshire Street Railway, 243 Mass. 94, 95, 137 N.E. 268; a society, association or partnership, Commissioner of Corporations & Taxation v. Co-Operative League of America, 246 Mass. 235, 238, 140 N.E. 811; Commonwealth v. Rozen, 176 Mass. 129, 131, 57 N.E. 223."

Although no case has been found wherein the question whether a governmental bureau can be construed as a "person" within the meaning of a statutory provision, such a construction appears valid, if, as stated above, the connection in which the word is used and the result intended to be accomplished is conducive to this interpretation. In addition, the word "person" has often been held to include the plural when to do so would aid in the effectuation of the statute wherein the term was used. Ex parte Mathews, 191 Calif. 35, 214 Pac. 981 (1923); People v. Croton Aqueduct Board, 26 Barb. (N.Y.) 240; Fusser v. Snyder, 282 Pa. 440, 128 Atl. 80 (1925); See also In re Eikel, 283 F. 285 (1922). Thus it is entirely possible that the marketing agreement and license here in question may be construed to allow the Secretary of Agriculture to appoint the members making up the Bureau of Agricultural Economics as his agents to receive the reports required by the Secretary. The express designation of "any officer or employee of the Government" may be thought thereby to impliedly exclude any other Government agency such as the Bureau of Agricultural Economics. However, the word "including" is ordinarily construed to be a word of enlargement rather than of limitation. Cunningham v. Sizer Steel Corporation, 1 Fed. 2nd 337 (1924); Matter of Goetz, 75 N.Y. Supp. 750 (1902). Therefore, the use of the words "any officer or employee of the Government" following the word "including" should not be construed to limit the meaning of the word "person".

II. The nature of the delegated power is such as to require its exercise by a bureau rather than an individual.

It is a familiar rule of construction that a statute is to be construed with reference to its manifest purpose or object. Therefore, it is strongly persuasive to the effect that the Secretary of Agriculture may designate the Bureau of Agricultural Economics as his agent to receive the reports in the instant case, if the exercise of the power which is to be delegated by the Secretary, under the marketing agreement and license, is such as to require the attention of a group of persons rather than an individual. A mere inspection of Section 4, Article V of the marketing agreement and Section 4, Article IV of the license reveals that they concern the handling and compiling of the numerous reports concerning the quantity of peanuts cleaned and stored by the millers. Obviously this work requires the attention of a body such as the Bureau and the work clearly can not be done effectively by an individual.

III. The appointment by the Secretary of Agriculture of the chief or some other official of the Bureau as the agent to require and receive the reports is recommended as the safer procedure.

Although I am of the opinion that the Secretary of Agriculture may appoint the Bureau of Agricultural Economics as his agent to execute the functions vested in him by Section 4, Article V of the Marketing Agreement and Section 4, Article IV of the License for Peanut Millers, the matter is not entirely free from doubt. That the Secretary may appoint the Chief, or some other official of the Bureau is clear inasmuch as Article XV of this Agreement and Article IX of the License both expressly provide:

"The Secretary may by a designation in writing, name any person including any officer or employee of the Government, to act as his agent in connection with any of the provisions of this Agreement."

This procedure is therefore recommended. The right of the Chief or other official of the Bureau to delegate to employees of the Bureau the task of receiving and handling the reports received from the millers, upon the request of the designated Bureau official, would likewise appear unquestionable. The work done by the employees would be ministerial in character and seems within the contemplation of the provisions of the Marketing Agreement and License in view of the large number of reports to be reviewed and the magnitude of the task in compiling them.

Francis M. Shea,
Chief of the Brief and Opinion Section,
Office of the General Counsel.

No. 73

COTTON OPTION-BENEFIT CONTRACTS -- REMEDIES
TO PROTECT INTERESTS OF SHARECROPPERS

The Secretary may rescind and sue to recover all or any portion of benefit payments made under a 1933 cotton contract--

a. Where the land involved was worked by sharecroppers who did not sign as producers, were not listed as lienholders or other persons having an interest in the crop, and did not give written consent to the making or performance of the contract.

b. Where such share-croppers were listed as lienholders, but the producer falsely represented that he intended to secure their consent before any part of cotton planted was taken out of production, and did not secure their consent.

c. Where the producer falsely certified that he had obtained consent of all lienholders.

d. Where such share-croppers did not sign as producers, but were listed as lienholders or other interested parties, and where their written consent to the making and performance of the contracts was obtained by fraud or duress.

The United States may, in any of the above situations, institute an action under Section 231, 31 U.S.C.A. to recover civil damages against the producer.

The Secretary may in any of the above situations withhold payment of the option-benefit.

The Secretary may set-off all or any part of the benefit payment under a 1933 cotton contract, under any of the circumstances listed, against amounts due the producer under a 1934 cotton contract.

Any money recovered from producers under the circumstances listed in question I should be credited to the appropriation from which the benefit payments were made.

Any money recovered from producers under Section 231 of Title 31 of the United States Code in excess of the amount paid out from the appropriation for benefit payments should be covered in the Treasury as miscellaneous receipts; the question as to the disposition of funds recovered in an amount equal to the moneys paid out from the appropriation is an appropriate one for determination by the Comptroller General.

July 8, 1934.

MEMORANDUM TO THE COMMITTEE DESIGNATED TO DEAL
WITH CONTROVERSIES BETWEEN LANDLORDS AND THEIR
SHARE-TENANTS AND SHARE-CROPPERS

In response to your inquiry of March 8, 1934 addressed to Mr. Frank, I submit my opinion upon the following:

QUESTIONS

I. May the Secretary of Agriculture rescind and sue to recover all or any portion of cash benefit payments made under a 1933 cotton contract --

A. Where the land involved was worked by share-croppers who did not sign as producers, were not listed as lienholders or other persons having an interest in the crop, and did not give written consent to the making or performance of the contract.

B. Where such share-croppers were listed as lienholders but did not sign as producers and did not give written consent to the making or performance of the contract.

C. Where such share-croppers did not sign as producers but were listed as lienholders, and where the written consent to the making of the contract was obtained by fraud or duress.

II. May the United States in any of the above situations institute an action, under Section 231 of Title 31 of the United States Code, to recover civil damages against the producer?

III. May the Secretary in any of the above situations, withhold payment of the option-benefit?

IV. May the Secretary set-off all or any part of the benefit payment made under a 1933 cotton contract, under any of the circumstances listed in question I, against amounts due the producer under 1934 cotton contracts?

V. What disposition may be made of money recovered from producers under the circumstances listed in question I?

VI. What disposition may be made of money recovered from producers as civil damages in an action brought under Section 231 of Title 31 of the United States Code?

OPINION

I. The Secretary may rescind and sue to recover all or any portion of benefit payments made under a 1933 cotton contract --

A. Where the land involved was worked by share-croppers who did not sign as producers, were not listed as lienholders or other persons having an interest in the crop, and did not give written consent to the making or performance of the contract.

B. Where such share-croppers were listed as lienholders, but the producer falsely represented that he intended to secure their consent before any part of cotton planted was taken out of production, and did not secure their consent.

C. Where the producer falsely certified that he had obtained consent of all lienholders.

D. Where such share-croppers did not sign as producers, but were listed as lienholders or other interested parties, and where their written consent to the making and performance of the contracts was obtained by fraud or duress.

II. The United States may, in any of the above situations, institute an action under Section 231 of Title 31 of the United States Code to recover civil damages against the producer.

III. The Secretary may in any of the above situations withhold payment of the option-benefit.

IV. The Secretary may set-off all or any part of the benefit payment made under a 1933 cotton contract, under any of the circumstances listed in question I, against amounts due the producer under a 1934 cotton contract.

V. Any money recovered from producers under the circumstances listed in question I should be credited to the appropriation from which the benefit payments were made.

VI. Any money recovered from producers under Section 231 of Title 31 of the United States Code in excess of the amount paid out from the appropriation for benefit payments should be covered in the Treasury as miscellaneous receipts; the question as to the disposition of funds recovered in an amount equal to the moneys paid out from the appropriation is an appropriate one for determination by the Comptroller General.

I - A

(1) Representations Made by Producers
Entering Into 1933
Cotton Contracts

By executing the Offer to Enter Into Cotton Option Benefit or Benefit Contracts, a producer made certain representations of fact. Paragraphs 3, 4 and 5 thereof provide:

"3. This crop is subject to lien in favor of:

| NAME | NATURE OF LIEN | ADDRESS |
|------|----------------|---------|
|------|----------------|---------|

(After the name of the holder of the lien, insert nature of the lien, as landlord and/or mortgagee)

"4. Consent in writing of the lien holders has been or will be obtained by me before any part of the cotton planted is taken out of production and/or before receipt by me of any benefit which may accrue to me hereunder.

"5. If this offer is accepted I shall conform to such regulations as are or may be prescribed by the Secretary of Agriculture or authorized by him pertaining to the purposes of this offer."

In paragraph 12 of the offer the producer warrants "the correctness of all matters and facts stated as such" in the offer, and obligates himself "to the performance of all obligations imposed" thereby or by regulations promulgated by the Secretary. Immediately following the line for the producer's signature on the Offer Form, provision is made for "lienholders and/or others having an interest in the 1933 cotton crop" to consent (1) to the making of the Offer and to the performance of the conditions thereof, when and if accepted, and (2) that the Secretary or his agents might deal with the producer as if he were the sole party having interest in the cotton land or crop.

Section 100 of the Cotton Regulations, Series 1, promulgated by the Secretary of Agriculture with the approval of the President, which, by virtue of paragraph 5 of the Offer, must be treated as part of the contract, contains the following definitions of "producer" and "lienholder":

(f) "Producer" means the operator of a cotton farm, including corporations and other business entities.

(g) "Lien-holder" means any person, corporation, or business entity having a legal or equitable claim for security against the 1933 cotton crop being grown on lands embraced in any offer to enter into cotton option-benefit or benefit contracts. (Underscoring provided.)

In the same section the terms "benefit payment" and "option-benefit" are defined as follows:

(d) "Benefit" or "benefit payment" means a cash payment moving from the Secretary of Agriculture to the producer in consideration of the reduction of cotton acreage pursuant to subsection (1) of paragraph 11 of the offer to enter into cotton option-benefit or benefit contracts.

(e) "Option-benefit" means a cash payment defined in (d) above in combination with a cotton-option contract pursuant to subsection (2) of paragraph 11 of the offer to enter into cotton option-benefit or benefit contracts. (Underscoring provided.)

Sections 200, 205, 206, 209, 300 and 352 of the Regulations are particularly important. They provide:

"SEC. 200. Any producer, as defined above, who owns or rents cotton lands and has or will have legal ownership of the cotton crop produced in the year 1933 on such land is eligible to become a party to a cotton contract with the Secretary. Where ownership is in more than one person, all who are interested as owners must sign the offer either as principal parties or as consenting parties."

"SEC. 205. All lienholders and/or other persons having an interest in the 1933 cotton crop now being grown on the lands embraced in any producer's offer, if they consent to such offer, must indicate such consent by signing their names at the place provided for that purpose on the offer."

"SEC. 206. Checks representing cash benefits may be made payable to the producer and a lienholder or lienholders, jointly, if request therefor be made in the offer.

"Where, from the offer form, it appears that ownership of the cotton crop is in more than one person, as in the case of partnerships, husband and wife, or two or more producers signing the same offer, or cases where the legal relationship of parties interested in the offer of a cotton crop is uncertain, but it is apparent that all have an interest in the crop, payment may be made by check payable to all so interested in the crop as their interests may appear."

"SEC. 209. No lienholder, in consideration of signing the consent agreement contained in the offer to enter cotton option-benefit or benefit contracts, may enter or attempt to enter into an agreement with any producer whereby the amount of the debt secured by a lien held by him against the crop of such producer is increased, or the due date of such debt made earlier. Any lien-holder who enters or attempts to enter into such an agreement shall be guilty of a violation of these regulations, and any such agreement shall be null and void.

"SEC. 300. If the producer does not obtain the consent and signature of all lienholders and/or other parties having an interest in the crop on the acreage to be withdrawn from production, and the Secretary enters into a cotton contract with the producer with or without knowledge of the lack of consent of such interested party or parties, the Secretary shall have the right at any time to withdraw from such contract, or to withhold benefit payments until the consent of all such interested parties has been obtained or the matter has been otherwise adjusted."

"SEC. 352. The Secretary undertakes to make compensation to the producer, whether by cash payment only or by cash payment plus a cotton-option contract, only after due proof of performance by the producer, as prescribed in regulations and/or instructions."

It is evident, from the foregoing, that the procurement of consent from lienholders or other persons having an interest in the crop was an important element of the contract. The person executing the offer as producer was first called upon to name those having liens on the crop, and to give the nature of such liens. He next represented that he either had obtained the required consent of lienholders or would obtain it before accepting benefits under the contract, and then warranted the correctness of all matters and facts stated in the Offer and bound himself to conform to such regulations as the Secretary might prescribe, if the Offer should be accepted. These regulations provided that all who were or would be interested as owners must sign either as principal parties or as consenting parties; that all lienholders and/or other persons having an interest in the crop, if they consented to the Offer, were required to indicate such consent in designated places; and that if the consent and signature of all lienholders and/or other persons having an interest in the crop was not obtained, the Secretary, whether he entered into the contract with or without knowledge of the lack of such consent, should have the right at any time to withdraw from the contract or to withhold benefit payments until the consent of all interested parties had been obtained, or the matter had been otherwise adjusted. The importance of the consent element is further indicated by the fact that in executing his certificate of performance the producer is required to certify, among other things:

"* * * (6) that I have obtained, either on the offer form heretofore submitted by me to the Secretary of Agriculture, or otherwise, and have already transmitted, or am herewith transmitting, to the Secretary of Agriculture the written consent to my offer of all holders of liens, if any, on my cotton crop on the land so taken out of cotton production; (7) that the check to cover the cash benefit payment which may be due under my contract with the Secretary of Agriculture may be drawn payable jointly to the order of all persons who appear to have an interest in the crop, unless it shall clearly appear either from my offer or from data otherwise supplied by me that any such person or persons shall have waived such right; and (8) that I have duly performed all the other terms and conditions on my part to be performed under my contract with the Secretary of Agriculture."

While it is true that paragraphs 3 and 4 of the Offer refer only to lienholders, still it will be seen that the consent provisions themselves, as well as Sections 200, 205, 206 and 300 of the Regulations, apply to lienholders and/or other persons having an interest in the crop. Clearly it was intended that the producer should obtain from lienholders and others having an interest in the crop written consent first to destruction of the cotton crop and, second that the Secretary might deal with the producer as though he were the sole party in interest. In a pamphlet entitled "Instructions to Field Workers" the following statement appears:

"It is necessary that all lienholders and/or other persons having an interest in the 1933 cotton crop now being grown on the lands embraced in the producer's offer shall indicate their consent by signing their names at the places provided for that purpose on the contract form."

It is submitted that the producer was clearly called upon to list and obtain the written consent of all lienholders and/or other persons having an interest in the crop, and that when he warranted the correctness of facts stated in the Offer, without naming therein any such interested persons, he, in effect, represented that his crop was subject to no liens, and, hence, that there was no one from whom he should obtain written consent.

(2) By Virtue of Their Interest in the Crop Grown by Them, Share-Croppers Should Have Signed 1933 Cotton Contracts Either as Principals or as Consenting Parties.

The lack of uniformity displayed by courts in their treatment of share-croppers is attributable, to some extent at least, to the fact that slight variations in the terms of cropping agreements may materially affect the rights and interests of the respective parties. Thus, in some

instances croppers and landowners are held to be tenants in common of the crop. In other cases the courts have said that share-croppers are laborers or servants paid for their labor with a share of the crop.

While most authorities seem to agree that under a pure and unqualified cropping agreement the entire legal ownership of the crop is in the landowner until he divides it, the cropper is recognized as having some right or interest pertaining to the crop. He is at least entitled to go on the land in order to produce, harvest, and sometimes to divide the crop. It has been said that he has actual possession, though legal or constructive possession is vested in the landowner, State v. Townsend, 170 N.C. 696 (1915). In Georgia the courts have referred to the cropper's interest in the crop as being a "limited interest", Randolph v. State, 85 S.E. 258 (Ga. App. 1915), or a "mortgageable interest"; and statutory recognition of the cropper's interest is found in Section 3707 of the Georgia Civil Code which declares that title to the crop, subject to the interest of the cropper therein remains in the landowner. See also Beard v. State, 43 Ark. 284 (1884) where the court stated that a cropper had a contingent interest which could be mortgaged. In Arkansas, Georgia, Alabama and Oklahoma, croppers are given statutory liens upon the crop in the nature of laborer's liens. Burgie v. Davis, 34 Ark. 179 (1879); McElmurray v. Turner, 12 S.E. 359 (Ga. 1890); Lewis v. Owens, 124 Ga. 228, 52 S.E. 333 (1905); Farrow v. Wooley, 149 Ala. 373, 43 So. 144 (1907); and First Nat. Bank of Bristow v. Rogers, 24 Okla. 357, 103 Pac. 582 (1909). See also Barnhardt v. State, 169 Ark. 567, 275 S.W. 909 (1925).

Early cases in Mississippi held that the parties to a cropping agreement were tenants in common. Betts v. Ratliff, 50 Miss. 561 (1874), Doty v. Heth, 52 Miss. 530 (1876). Later cases said that the relation of landlord and tenant was created. Schlicht v. Callicott, 76 Miss. 487, 24 So. 869 (1899), Alexander v. Zeigler 84 Miss. 560, 36 So. 536 (1904). When the question arose again the court in Staple Cotton Co-operative Ass'n v. Hemphill, 142 Miss. 298, 107 So. 24 (1926) recognized the difference of opinion, and while it would not attempt to decide which was the correct holding, treated the share-cropper and landowner in that particular case as co-tenants. Under a statute in North Carolina, it has been held to be immaterial whether the producer of a crop is a tenant or a cropper. As to both, legal possession is vested in the owner of the land. State v. Austin, 123 N.C. 748, 31 S.E. 731 (1898). But in Tobacco Growers Ass'n v. Bissett, 187 N.C. 180 121 S.E. 446 (1924), the court said that the landlord merely had a preferred lien or was trustee, so to speak, in possession until advances, if any, were paid; and that the statute did not "make the landlord of a cropper the owner nor give him title to the tenant's share of the crop". In Rouse v. Wooten, 104 N.C. 229, 10 S.E. 190 (1889), the North Carolina court was convinced that a cropper, though not having a vested property interest until the crop was matured and gathered, nevertheless had a sufficient interest or right to entitle him to bring an action of conversion against a lienor whose right arose after the crop was planted.

Apart from these rules of law, the rights and liabilities of croppers and landowners are governed by the terms of the contracts into which they enter. No general rules can be laid down which will be applicable to all cropping agreements, because the precise nature of the interest or title of the contracting parties is largely a question of their intention and must depend upon the cropping agreement. Slight provisions therein may very materially affect the legal relations of the parties. 8 R. C. L. P. 373 (Sect. 19 "Crops"); Thompson On Real Property (1924), Vol. 2, Sect. 1028. Thus it is generally recognized that where by the contract the use of the land is given to the person who cultivates it and returns a specified portion of the crop produced, there is created a tenancy in common in the crop. 8 R. C. L. P. 374, (Sect. 21 "Crops").

Where there is a simple, unqualified cropping agreement and the cropper is deemed to have no vested interest while the crop remains en masse, it may fairly be said, however, that he has an inchoate interest in the crop, or a portion thereof, which will ripen into title upon adjustment of the respective rights of the parties and division of the crop. It may safely be said that such a cropper's inchoate interest is not merely in the nature of a contract claim for wages, but is an inchoate right or interest in specific property - the particular crop, or a portion thereof, which he has cultivated. There is authority that upon maturity he may sue for his undivided share in the crop, or its value. 17 C. J. 383. In Mosely v. Cheatham, 62 Ark. 133, 34 S. W. 543 (1896), it was indicated that he could bring a bill in equity to compel division of the crop. The doctrine is also laid down that even where the cropper is discharged for cause, he has a right to recover such amount of the crop, or its proceeds, as is proportioned to the time which he worked it. 8 R. C. L. P. 377 (Sect. 24 "Crops").

The cases which hold that the landowner has a lien in the particular crop for advances made to the cropper lend weight to the above theory as to the nature of the cropper's inchoate right or interest under an unqualified cropping agreement. In the leading Arkansas case, Tinsley v. Craige, 54 Ark. 346, 15 S. W. 897 (1891) the court, after considering a statute giving a landlord who advanced money or supplies to "employees" (croppers) a lien upon the crop for such advances, said: "It is obvious that the Act can apply only to that class of employees who have an interest in the crop, for it confers a lien upon the crop only. A cropper on shares has such an interest as an employee within the meaning of the Act." Similarly, in the case of Betts v. Ratliff, 50 Miss. 561 (1874), it was stated that a cropper or laborer must have an interest in the specific "agricultural products" because that is the subject upon which the lien attaches, and that if a person merely worked for wages in money, it is plain there would be no lien. In at least one case, however, Fields v. Argo, 30 S.E. 29 (Ga. 1898), a different result was reached on the theory that under an unqualified cropping agreement, as title to the crop was in the landlord, he could have no lien therein for supplies furnished the cropper.

Section 200 of the Regulations declares that any producer who owns or rents cotton lands and has or would have legal ownership of

the cotton crop is eligible to become a party to the contract; and that where such ownership is divided, all persons interested as owners should sign either as principal or as consenting parties. Even though under the decisions some croppers might be held not to be renters of cotton land and not to have had legal ownership in any portion of the crop at the time the Offer is executed, they were persons who would have acquired legal ownership of a part at the time of division, had the crop not been destroyed. Under the decisions in some States they are renters of cotton lands. Therefore the croppers clearly had such an interest that their consent should have been obtained. They were certainly within the class of persons designated as "lienholders or other persons having an interest in the crop". Croppers who, by virtue of the terms of their cropping agreements, may be said to have had the legal ownership of a co-tenant, certainly were eligible to sign the contracts as producers or principal parties. If they did not sign as principal parties it was clearly necessary to procure their written consent as interested parties. In the pamphlet "Instructions To Field Workers", page 3, paragraph 2, is this comment on the 1933 cotton acreage reduction plan;

"The plan is open to all cotton farm operators, whether they own the land on which they are farming, or rent it on a cash basis, on a share basis or otherwise. The test as to who may make contracts is the legal ownership of the crop. Where legal ownership is in more than one person, all who are interested as owners must sign the contract form, either as principal parties or as consenting parties, before it can be accepted by the Secretary of Agriculture. It is assumed that agreements by the operators and their tenants will provide for division of payments in proportion to their interest in the crop."

Whether it was intended that all such persons as share-croppers, who derived an interest in the cotton crop either by reason of their participation in its cultivation, or because of some actual assistance rendered in that connection, should share in the benefit payments, is a question more difficult of determination. Was the consent of all interested parties required merely to prevent any interference with performance of the contract - the plowing up of the cotton - or was it intended by insisting that all such persons sign as principal or consenting parties that their interests should be protected and that they should share proportionately in the benefit payments?

The utilization of several methods, separately or in combination, was authorized in order to effectuate the declared policy of the Agricultural Adjustment Act - to equalize the purchasing power of agricultural commodities with the purchasing power of such commodities during the pre-war base period. The 1933 Cotton Adjustment Program sought, first, to reduce cotton production through a reduction of acreage. It also provided a method of giving financial assistance to producers of cotton who voluntarily cooperated with the Government in adjusting production. The producer was permitted to elect whether to take a straight

cash payment or a combination of an option on Government cotton and a smaller cash payment. In executing the Offer the producer had to make this election. The cash payments varied with the productivity of the land taken out of production. Where the producer chose to take an option, such option covered an amount of cotton equal to the amount that would have been produced on the retired acreage. The additional small cash payment was designed to compensate the producer for his cost in bringing the portion of the crop taken out of production to its then present stage. Where the producer elected to receive only a cash payment without a cotton option, the amount of the payment was determined on a per acre basis yield. The obvious purpose, in both cases, was to provide compensation for destruction of the cotton crop. This compensation, in the first instance, took the form only of a benefit payment. In the second case, in addition to a smaller benefit payment, there was a "profit" to be derived from sale of the cotton covered by the option. Sections 6 and 7 of the Act authorize the Secretary to enter into option contracts, and in Section 8 (1) he is authorized:

"To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments."

It was not contemplated that the Government should receive any tangible return for these benefit payments, except destruction of the cotton crop or the taking of land out of production, which was desired by the Government as a step in economic rehabilitation. In short, benefit payments apparently resemble bounties or gratuities which the Secretary may pay in such amounts as he deems fair and reasonable. But it seems more consistent with the purpose for which such payments were authorized, and more in line with the provisions of the contract and the Regulations, to conclude that it was intended the benefit payments should be divided among all persons who, by virtue of some part taken in the cultivation of the land, had an interest in the crop which was destroyed. The statement quoted above, that it was assumed producers by agreement would provide for division of the payments in proportion to the interests of tenants, is particularly pertinent. While it may very well be that this was an indication the Secretary would rely primarily upon such agreements, it does not necessarily follow that where there has not been proper division of the benefit payments, the Secretary will do nothing to protect the interested persons. It may correctly be said that a primary purpose of the Act was to increase the purchasing power of individual farmers cultivating the soil and thereby to stimulate the purchase of industrial commodities, or articles that farmers buy. Certainly this could not best be accomplished by restricting those entitled to share in benefit payments so as to exclude sharecroppers.

(3) Failure to Name Croppers and to
Obtain Their Written Consent
Constitutes Misrepresentation of
Material Facts

From the foregoing it follows that, if the producer in executing the offer did not disclose that the land involved was worked by croppers, and failed to get their written consent, he falsely represented that there were no such persons having an interest in the crop. That nondisclosure may constitute misrepresentation is well established. In Clark on Contracts (4th Ed. 1931), Sect. 137, misrepresentation is defined as being a misstatement or nondisclosure of facts. The same authority, in Section 141, states that nondisclosure will amount to fraud if there is active concealment or suppression of facts which there is a duty to disclose. It is pointed out that the exceptions to the rule that nondisclosure is not fraud lie in the distinction between mere silence where there is no duty to speak, and the concealment of facts which are peculiarly within the knowledge of the party concealing them, and which, under the circumstances he is bound in good faith to disclose. Obviously, there was a duty on the part of the producer to speak, and his concealment of the fact that the land was worked by croppers amounted to a misrepresentation.

In the case of Stewart v. Wyoming Cattle Ranch Co. 128 U.S. 383, 388 (1888), the Supreme Court said:

"In an action of deceit, it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment; aliud est tacere, aliud celare; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

But it is not necessary to rely solely upon the theory of non-disclosure. By the failure to list lien-holders, the producer affirmatively represented that there were no other persons interested in the crop.

Not only were these representations of the producer false, but they were also material. The author referred to above stated that while it may often be difficult to say when a representation is material, it is safe to say that it is always material if, had it been known to be false, the contract would not have been entered into. Such is the

situation here. In Section 300 of the Regulations it was specifically provided that if a producer failed to obtain written consent of lien-holders and/or other interested parties the Secretary should have the right at any time, even though chargeable with knowledge of the lack of consent, to withdraw from the contract and withhold benefit payments thereunder.

(4) The Secretary May Rescind the Contract
and Recover Some Part, if not all, of
The Benefit Payment.

In many instances where producers neither name share-croppers nor submit their written consent, it is believed the Government can demonstrate that there was such fraud or misrepresentation of material facts as to warrant rescission of the contract. Citation of few authorities is necessary to establish the right of a defrauded party to rescission. In Williston On Contracts, Vol. III, Sect. 1523, three remedies open to the defrauded party to a contract are stated:

1. A right to damages for being led into the transaction. Here the injured party does not seek to undo the fraudulent transaction, but merely claims sufficient consideration to make his position as good as it otherwise would have been.
2. Rescission of the fraudulent transaction. It generally follows here that there must be restoration of the situation the parties occupied before entering into the fraudulent transaction.
3. Enforcement against the fraudulent person of the kind of bargain which he represented he was making.

Our concern is with the second remedy named. Not only is rescission permitted for fraud, but it is generally recognized that even honest misrepresentation of material facts will justify rescission. The distinction between misrepresentation and fraud is stated in Clark On Contracts (4th Ed. 1931) Sec. 137, as follows:

"Misrepresentation means an innocent misstatement or nondisclosure of facts, while fraud consists in representations which are known to be false, or which are made in reckless ignorance of their truth or falsity or in nondisclosure or concealment of facts under such circumstances that it amounts to a representation that the facts concealed do not exist."

The following quotations from Williston On Contracts outline underlying general principles:

"It is not necessary in order that a contract may be rescinded for fraud or misrepresentation that the party making the misrepresentation should have known

that it was false. Innocent misrepresentation is sufficient. For though the representation may have been made innocently, it would be unjust to allow one who has made false representations even innocently, to retain the fruits of a bargain induced by such misrepresentations. * * * " (Sect. 1500).

"In a suit in equity for rescission a plaintiff who has received consideration commonly offers in his bill to restore the consideration, and whether such an offer is made or not the decree in such a suit will provide, not simply for the return by the defendant of what he has wrongfully acquired, but for the restoration of the consideration by the plaintiff. The same principles apply where rescission is exercised without the aid of equity. The injured party must make an offer to restore what he has received on condition of receiving in return what he was defrauded into parting with, and if the offer is rejected must hold as bailee what he has received and refrain from exercising acts of ownership. The place of return is the place of the original delivery. Accordingly, if the defrauded party is unable to restore what he has received, rescission is impossible." (Sect. 1529)

"This rule, however, is subject to the exception that if the consideration was worthless it need not be returned. And one who attempts to rescind a transaction on the ground of fraud, mistake or otherwise, is not bound to restore that which he has received by virtue thereof, when, in any event, he is entitled to retain it as indisputably his own whatever may be the fate of his effort to rescind the transaction. In other cases where on the particular facts it seems equitable to allow rescission without complete or perfect restoration of the consideration, the modern tendency seems to favor the relief, and courts of law adopting the more liberal rule in equity no longer adhere to the strict construction upheld in earlier decisions. Thus diminution in value of the consideration by lapse of time, or by reasonable use before the discovery of the fraud, or the application of the consideration for the defendant's benefit, or the use of part of the consideration in testing, will not prevent rescission, nor will inability to return the consideration when the inability is due to the wrongful conduct of the fraudulent party. The matter has been thus summarized: 'That a party seeking rescission of a contract must return, or offer to return, what he has received under it, and thus put the other party as nearly as is possible in his situation before the contract, is the law. But this rule is wholly an equitable one; impossible or unreasonable things, which do not tend to accomplish equity in the particular transaction, are not required.' In some cases even where restoration of the consideration is entirely possible, it has not been required. * * * Where circumstances permit, some courts also have allowed as a sub-

stitute for restoration of the consideration a deduction of the amount of it from the recovery against the wrongdoer. This is the most satisfactory disposition of many cases." * * * Sect. 1530).

The policy of allowing as a substitute for restoration of consideration a deduction from the amount recovered has also been adopted in a number of cases where rescission has been sought for breach of contract. As above, Williston observes that this is the most desirable method of disposing of such cases where the defrauded party, through no fault of his own, is unable to return what he has received.

It is obvious that the Government cannot return to the producer the crop which has been destroyed pursuant to the contract. Under the authorities, however, it appears that this inability would not preclude the Government from invoking the aid of an equity court to rescind the contract. In the case of In Re American Knit Goods Mfg. Co., 173 Fed. 480 (1909), suit was instituted to rescind three contracts and to obtain the return of unpaid yarn delivered under the contracts. Though relief was denied in this instance on the ground there had been no misrepresentation of material facts, the court in answering the contention that the relief should be denied because petitioners had not returned what they had received, said:

"The trustee objects that the petitioners are not entitled to rescission because they have not returned or offered to return what they have received from the bankrupt. This would be true in an action at law where the rescission was the act of the party, but it is not so in equity where rescission is asked for of the court. In the latter case all equities will be protected in the decree. Allerton v. Allerton, 50 N. Y. 670; Vail v. Reynolds, 118 N.Y. 297, 302, 23 N.E. 301.

"The trustee also claims that the petitioners are not entitled to rescission because there is no evidence of any intentional misrepresentation by the bankrupt or its officers. This at least in equity is not necessary. The misrepresentation of a material fact upon which the other party relies, even if innocent, is good ground for rescission. Hammond v. Pennock, 61 N.Y. 145; Carr v. National Bank & Loan Co., 167 N.Y. 379, 60 N.E. 649, 82 Am. St. Rep. 725; Smith v. Richards, 13 Pet. 26, 36; Doggett v. Emerson, 3 Story, 700, Fed. Case No. 3, 960; Kell v. Trenchard, 142 Fed. 16, 23, 73 C.C.A. 202." (p. 482).

It is well established by the Supreme Court that when the United States is vindicating its dominion over public lands by suing to rescind and cancel contracts, leases and conveyances, the underlying maxim that "he who seeks equity must do equity" is not applicable. Pan American Pet. & Transport Co. v. United States, 273 U.S. 456 (1926); Crausey v. United States, 240 U. S. 399 (1916); Heckman v. United States, 224 U.S.

413; and United States v. Trinidad Coal Co., 137 U.S. 160.

In the Pan American Case the court held that equity did not exact as a condition to the relief sought by the United States that the defendants be compensated for the cost or value of work performed or fuel oil furnished under the contracts. Suit was brought by the Government to cancel two contracts and two leases of lands in the Naval Petroleum Reserve No. 1. The complaint alleged that the contracts and leases were obtained and consummated by means of conspiracy, fraud and bribery. The trial court ordered them cancelled and directed the surrender of the land and equipment. In stating an account between the United States and each of the companies the trial court charged the Pan American Petroleum and Transport Company with the value of petroleum products received by it and the amount of profits derived from their resale, and gave credit for the actual cost of construction work performed and of fuel oil delivered under the contracts. The Pan American Petroleum Company received like treatment, being charged with the value of petroleum products taken under the leases and given credit for actual expenditures in drilling and operating wells and making other useful improvements. On appeal the Circuit Court of Appeals affirmed the decree so far as it awarded affirmative relief to the United States, and reversed that part which gave credit to the companies.

The companies maintained that in any event they were entitled to credit for the cost of construction work performed and for the fuel oil furnished at Pearl Harbor, as well as for the amounts expended in drilling wells and making other improvements. They contended that as a condition of granting the relief claimed by the Government equity required that they be given credit for such expenditures; that otherwise the United States would be unjustly enriched; that the United States had fully paid for benefits received from the companies' expenditures, and that, in effect, it sought to recover payments it had made voluntarily. In affirming the decree, however, the Supreme Court said:

"In suits brought by individuals for rescission of contracts the maxim that he who seeks equity must do equity is generally applied, so that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. 'The court proceeds on the principle, that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction.' Neblett v. MacFarland, 92 U. S. 101, 103. And, while the perpetrator of the fraud has no standing to rescind, he is not regarded as an outlaw; and, if the transaction is rescinded by one who has the right to do so, 'the courts will endeavor to do substantial justice so far as is consistent with adherence to law.' Stoffela v. Nugent, 217 U. S. 499, 501. The general principles of equity are applicable in a suit by the United States to secure the cancellation of a conveyance or the rescission of a contract. United States

v. Detroit Lumber Co., 200 U. S. 321, 339; United States v. Stinson, 197 U. S. 200, 204; State of Iowa v. Carr, 191 Fed. 257, 266; cf. Mason v. United States, 260 U. S. 545, 557, et seq. But they will not be applied to frustrate the purpose of its laws or to thwart public policy." (p. 505)

* * * * *

"It was the purpose of those making the contracts and leases to circumvent the laws and defeat the policy of the United States established for the conservation of the naval petroleum reserves. * * * The contracts and leases and all that was done under them are so interwoven that they constitute a single transaction not authorized by law and consummated by conspiracy, corruption and fraud. The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. Its position is not that of a mere seller or lessor of land. The financial element in the transaction is not the sole or principal thing involved. This suit was brought to vindicate the policy of the Government, to preserve the integrity of the petroleum reserves and to devote them to the purposes for which they were created. The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States. They may not insist on payment of the cost to them or the value to the Government of the improvements made of fuel oil furnished as all were done without authority and as means to circumvent the law and wrongfully to obtain the leases in question." (p. 508)

In the Causey Case, supra, suit was brought in equity by the United States to recover title to public lands conveyed to defendant under the homestead laws. The patent was obtained by fraud. The defendant paid the United States for the land in scrip at the rate of \$1.25 per acre. The complaint did not contain an offer to return the scrip, and it was insisted by the defendant that, because of such failure, the suit could not be maintained. The Supreme Court said:

"The objection assumes that the suit is upon the same plane as if brought by an individual vendor to annul a sale of land fraudulently induced. But, as this court has said, the Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title but also to enforce a public statute and maintain

the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded." (p. 402).

In the Heckman Case, supra, the United States sued to cancel conveyances of allotted lands made by members of the Cherokee Nation on the ground that the conveyances were made in violation of restrictions upon the power of alienation. The Court said:

"Whether these restrictions upon the alienation of the allotted lands had been violated and the alleged conveyances were void, was a justiciable question; and in order that it might properly discharge its duty, and that it might obtain adequate relief, suited to the nature of the case in accordance with the principles of equity, the United States was entitled to invoke the equity jurisdiction of its courts. It was not essential that it should have a pecuniary interest in the controversy. In United States v. American Bell Telephone Co., 128 U.S. 315, 367, where the suit was brought to obtain the cancellation of certain patents, this court in commenting upon the statements which had been made in the case of United States v. San Jacinto Tin Co., 125 U.S. 273, with respect to the right of the United States to sue, said: 'This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States.'"

" * * * Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute. United States v. Trinidad Coal Co., 137 U. S. 160, 170, 171."

The Supreme Court has also recognized, in a suit between individuals, that the rule requiring one who seeks rescission of a contract to restore what was received under the contract is one of justice and equity, and must be reasonably construed and applied. Thackrah v. Haas, 119 U.S. 499 (1886). In that case the plaintiff asked for cancellation of an assignment or transfer of his property valued at \$80,000, fraudulently obtained for \$1200.00. In the complaint the plaintiff had requested that enough of the property he sold to repay the \$1200.00 as he could not raise that sum. The court reversed the judgment which had sustained demurrers below, saying:

"The plaintiff, without any fault of his, being unable to repay the consideration of the fraudulent transfer, equity will not require him to do so as a condition precedent to granting him relief, but will make due provision, in the final decree, for the repayment of that sum out of the property recovered. Reynolds v. Waller, 1 Wash. Va. 164; Allerton v. Allerton, 50 N.Y. 670; S.C., more fully stated in Harris v. Equitable Assurance Society, 64 N. Y. 196, 200." (502)

It seems apparent that the Government would not be denied rescission of these contracts by a court of equity, on the ground that it has not restored the producer to status quo. Nor would it be necessary for the Government to make any preliminary offer of restitution. Williston On Contracts, Sect. 1460, Vol. III. Though there could not be partial rescission and the contract must be rescinded in totc, the court could adjust all equities in its decree. 6 R. C. L. P. 941 ("Contracts" Sect. 322); Clark on Contracts (4th Ed. 1931) Sections 142 and 143; Black on Rescission and Cancellation (2nd Ed. 1929) Chapter 38, Sections 618 and 625. See also Dermott Land & Lumber Co. v. Walter A. Zelnicker Supply Co. 271 Fed. 918 (1921) where the court declared that the rule that a party who seeks to rescind a contract shall return whatever he

has received thereunder, like other rules of justice, must be so applied in the practical administration of justice as shall best subserve in each particular case the undoing of wrong and the vindication of right. It is inconceivable that the producer would be permitted to retain what has been paid him under the cotton contract and defend an action on the ground that the Government had not returned the destroyed crop.

It is generally stated that in order to obtain rescission of a contract the complaining party must show that he has suffered or likely will suffer actual loss or injury. On the other hand, however, many decisions repudiate altogether this rule requiring a showing of actual damage, in so far as it applies to the rescission of contracts. As pointed out in Section 112 of Black on Rescission and Cancellation (2nd Ed. 1929) these cases, though admitting the necessity of a showing of actual damage where the action is in tort, maintain that misrepresentations made willfully with the intent to deceive and to induce one to enter into a contract which he would not otherwise have made, furnish ground for its rescission, irrespective of the question whether or not the complaining party has sustained any loss, injury, or damage. In support of this proposition, the following cases are cited:

King v. Lamborn, 186 F. 21, 108 C. C. A. 123;
Wainscott v. Occidental B. & L. Ass'n., 98 Cal.
 253, 33 P. 88; Felt v. Bell, 205 Ill. 213, 68 N.E.
 794; Turner v. Keel, 165 Ill. App. 288; Wright v.
Spencer, 39 Idaho, 60, 226 P. 173; Clapp v. Greenlee,
 100 Iowa, 586, 69 N.W. 1049; Higbee v. Trumbauer,
 112 Iowa, 74, 83 N.W. 812; Barnes v. Century Savings
Bank, 149 Iowa 367, 128 N.W. 541; MacLaren v.
Cochran, 44 Minn. 255, 46 N.W. 408; Martin v. Hill,
 41 Minn. 337, 43 N.W. 337; Ludawese v. Amidon, 124
 Minn. 288, 144 N.W. 965; Fisher v. Seitz, 172 Mo.
 App. 162, 157 S.W. 883; Harlow v. La Brum, 151 N.Y.
 278, 45 N.E. 859; Rose v. Merchants' Trust Co.
 (Sup.) 96 N.Y.S. 946; Williams v. Kerr, 152 Pa.
 560, 25 A. 618; Hansen V. Allen, 117 Wis. 61, 93
 N.W. 805; Potter v. Taggart, 54 Wis. 395, 11 N.W.
 678.

This authority states, however, that the soundest reason appears to support those decisions which discriminate between cases where the deception is as to the identity or character of the subject matter and those where the deception concerns some collateral matter, and which hold that there must be proof of loss or injury in the latter class of cases, but not in the former. He maintains, therefore, that where a purchaser receives what he actually bargained for and bases his right to rescind on some false representation as to quality, condition, or matter affecting its value, he must show that such representation was material, that he was misled by it and that he has thereby sustained some loss or damage. In Section 1525 of Williston on Contracts (Vol. III, 1922) it is said: "It is not necessary that actual damage shall have resulted from fraud in order to justify rescission." A recent case in

Texas, Russell v. Industrial Transp. Co. 258 S.W. 462, 464 (1924), in commenting upon the above statement by Williston, points out that in the single case cited in support thereof, injury was shown. The Texas court observed that the facts in that case, Barnes v. Century Savings Bank, 149 Iowa, 367, 128 N.W. 541, showed that the complaining party had by fraudulent representations been induced to incur an obligation which but for the same he would not have incurred, and that injury was shown in that while the complaining party had not as yet suffered damage, he would do so unless the contract was cancelled.

The following quotation, taken from the Case of King v. Lamborn, 186 Fed. 21, 29 (1911), indicates that at least two federal cases seem to support the proposition that a complaining party need not show loss, injury, or damage in order to be entitled to rescission of a contract:

"As was said by Archbald, D. J., in Mather v. Barnes, etc. (C.C.) 146 Fed. 1000, 1004:

"The general principles upon which a suit of this kind proceeds are too well settled to need the citation of authorities. A misrepresentation with regard to material facts by which a purchase of property is intentionally induced amounts to a fraud which vitiates the transaction, and entitles the purchaser to be relieved. * * * Neither does it matter if misrepresentation be proved that the bargain, even so, was a good one, from which the purchaser is likely to sustain no loss. In an action of deceit, no doubt, this would be relevant on the question of damages in order to show that there were none; * * * but not so upon a bill to rescind. Hansen v. Allen, 117 Wis. 61, 93 N.W. 805; Clapp v. Greenlee, 100 Iowa, 566, 69 N.W. 1049. The purchaser is entitled to the bargain which he supposed and was led to believe that he was getting, and is not to be put off with any other, however good. It is of no consequence in the present instance, therefore, that the plaintiffs got coal lands of intrinsic value, which are worth perchance all that was paid for them, if they were fraudulently induced to believe by representations for which the defendants are responsible that the upper Freeport vein, for which they negotiated, underlaid the whole property, whereas, in fact, it extends over but a comparatively limited part."

"The principle is pointedly illustrated in Hansen v. Allen, the case cited by Judge Archbald. The plaintiff was shown one piece of land, but purchased another, believing in reliance upon the representations

of the agent of the vendor that he was purchasing the one shown him. In deciding the case, Cassoday, C. J., speaking for the court, said:

"It is claimed that even if the plaintiff was induced to make the contract by such fraud, yet there is a failure on the part of the plaintiff to show that he was actually damaged by reason of such fraud. It is enough to say that the plaintiff was entitled to have the particular piece of timbered land with a stream of water upon it which had been pointed out to him, and for which he had actually contracted, instead of a different piece of land situated at some other place.'

"So it was directly held in MacLaren v. Cochran, 44 Minn. 255, 258, 46 N.W. 408, 409:

"If a party is induced to enter into a contract by fraudulent representations as to a fact which he deems material, and upon which he has a right to rely, he may rescind the contract upon the discovery of the fraud, and the party in the wrong should not be heard to say that no real injury can result from the fact misrepresented.'

"To the same purpose, see Williams v. Kerr, 152 Pa. 560, 25 Atl. 618; Potter v. Taggart, 54 Wis. 395, 11 N.W. 678; Martin v. Hill, 41 Minn. 337, 43 N.W. 337; Harlow v. La Brum, 151 N.Y. 278, 45 N.E. 859; Wainscott v. Occidental Bldg. & Loan Ass'n., 98 Cal. 253, 33 Pac. 88; 14 Am. & Eng. Ency. of Law (2nd Ed.) 140.

"Authorities are cited, none from the federal courts, however, which are in apparent conflict with these. Among them are the following: American Bldg. & Loan Ass'n., 48 Neb. 455, 67 N.W. 500; Jakway v. Proudfit, 76 Neb. 62, 106 N.W. 1039, 109 N.W. 388; Cochran v. Pascault, 54 Md. 1; Wenstrom Consolidated Dynamo & Motor Co. v. Furnell, 75 Md. 113, 23 Atl. 134; Bom v. Rosser, 131 Ala. 215, 31 South. 430. But they do not appeal to our judgment as founded upon the better reasoning or voicing the sounder rule."

The cases requiring a showing of loss, damage or injury generally do not require that there be pecuniary or financial loss. Hence it is said that written instruments may be ordered cancelled on a showing that they might be used vexaciously or injuriously, when the evidence to impeach them might not be obtainable, or that they might be employed to harass one's business or impair his credit. Section 567,

Black on Rescission and Cancellation. Of course, it probably would be difficult to demonstrate in the cases under discussion that the Government has sustained actual pecuniary loss or injury, but it is evident that the Government did not get exactly what it bargained for. The consent of parties having an interest in the crop destroyed was not obtained, and the charge probably could be made that the Government has encouraged and induced the destruction of property without the consent of all persons having an interest therein. The Government may not have incurred thereby any legal obligations to such interested persons, but material injury to its prestige and reputation for fair dealing may be shown. It is evident, also that these instances of fraud or misrepresentation have detrimentally affected the Government's program of adjusting production and increasing purchasing power, and to this extent there certainly has been damage or injury. On the theory that portions of the benefit payments were intended for sharecroppers, it can be argued that these producers have attempted to prevent such croppers from receiving money intended for them. Such interference not only injuriously affects the croppers, but hampers the Secretary in carrying out the policy of the Act.

Furthermore, under paragraph 10 of the offer to enter into the Cotton Contract, the Secretary bargained for the right to enter upon the land and destroy the crop in the event that it was not destroyed by the other contracting party. Failure to obtain consent of the sharecroppers might well subject the Secretary or his agents to the risk of an injunction against the exercise of this right. See Colorado v. Toll, 262 U. S. 228.

It will be appreciated that a court of equity in a case involving rescission for fraud or misrepresentation proceeds on the principle that, as the transaction ought not to have taken place, its judgment or decree should place the parties as nearly as possible in the situation they would have occupied had they never entered into the transaction. This includes the adjustment of their respective rights and claims growing out of dealings with the subject matter. As a general proposition, the rule that the party obtaining rescission may recover money or other consideration paid under the contract assumes that he has restored or returned what he received. Consequently, it is said that upon rescission of a contract, either of the parties will be entitled to demand and recover from the other whatever was paid to him as the consideration of the contract or in execution of its terms, making allowance, of course, for the set off of corresponding demands, on the other side; and that the law will raise an implied promise of repayment on the part of the one thus receiving the money under a contract which is afterwards rescinded so that an action of assumpsit may be maintained against him, as for money had and received. Black on Rescission and Cancellation (2nd Ed. 1929) Vol. III, Sect. 703. In Sect. 688 this author also states:

"Moreover, one who is thus entitled to a decree for rescission and for the restoration to him of money paid under the contract is also entitled, under ordinary circumstances, to ask that the de-

... decree shall likewise require that the sum payable to him shall include interest at the legal rate on his money for the time it was in the hands of the other party. * * * So, on succeeding in a suit to rescind a sale of coal lands for fraud, the plaintiff, on reconveying, is entitled to have restored to him the purchase money paid, with interest, the expenses incurred in having the title searched and deeds made and recorded, and the taxes paid by him; * * *

"This principle of restoration applies not only to money paid as a consideration, but also to any physical property or evidence of debt transferred under the contract * * *. It is also a rule that property received under a contract is to be restored, upon rescission, in substantially as good condition as when received, but if this cannot be done, compensation in damages may be awarded."

When a court of equity has obtained jurisdiction for rescission or cancellation, and a decree in accordance with the prayer of the bill is warranted, it will retain jurisdiction for the purpose of adjusting all the rights and claims of the parties, growing out of the transaction, so as to do complete equity between them and leave nothing for future litigation which it can dispose of in the exercise of its equitable powers. The above author concludes that in pursuance of this principle, if there are various charges and demands between the parties of a pecuniary nature, the court may and should order an accounting to be had before a proper officer, the various claims to be set off against each other, when established, so that the final decree may require only the payment of the balance found due from one party to the other. Gatje v. Armstrong, 145 Col. 370, 78 Pac. 872, (1904).

Obviously, it is difficult to conjecture what a court under the circumstances of these cases would regard as an equitable solution in granting rescission of the contracts at the instance of the Secretary. In attempting to adjust the equities of the parties, the court, if it concluded that there was a duty, contractual or otherwise, on the part of the producer to divide and distribute the benefit money according to ownership of the crop, would not allow him to retain such amounts as were intended for and should have been paid to croppers, or other persons having an interest in the crop. It is not likely, however, that the court would require the producer to return the entire consideration paid without deduction of an amount proportionate to his interest in the destroyed crop. Had there been no misrepresentation or fraud, there would be no question but that he would be entitled to a portion of the money. His crop was destroyed, and to that extent he has cooperated in carrying out the policy of the government. He should not be permitted to gain through his false representations, but the court probably would not consider it equitable to punish him to the extent of compelling a return of the entire consideration received. To the extent, however, that such a producer has interfered with or detrimentally affected the

Government's recovery program, the equities are against him.

I - B

Where Croppers Were Named But Did Not Consent,
the Secretary May Have the Contract Rescinded
Where It Appears that The Producer Falsely Re-
presented that he Intended to Obtain Consent
Of The Lien-holders.

This situation differs from the first in that the share-croppers were listed as lienholders. As in "A", however, they did not sign as producers or give their written consent. On these facts an immediate question concerns the effect of the listing of croppers as lienholders upon the right of the Secretary to rescind the contract on the ground of misrepresentation or fraud.

In order to entitle a party to rescind or cancel a contract for misrepresentation or fraud, he must be able to show not only that there was a false representation as to a material fact, made with intent that it be acted upon, and that it was acted upon by the complainant, but also that in so acting he was ignorant of its falsity and reasonably believed it to be true. In other words, a contract may not be rescinded unless it is shown that the complaining party believed in the accuracy of the representations, and in entering into the contract placed his reliance upon them. If he knows the actual truth about the fact or condition referred to, he could neither reasonably be deceived by the misrepresentation nor place any dependence upon it. See Sections 110 and 419 of Black On Rescission and Cancellation (2nd Ed. 1929). In the case of Southern Development Co. v. Silva, 125 U. S. 247, the complainant sought to rescind a contract for the purchase of a silver mine, on the ground of fraudulent representations, and to recover the consideration paid. The Supreme Court, in affirming a decree dismissing the bill because there had not been clear and decisive proof of the complainant's right to the relief sought, said:

"In order to establish a charge of this character the complainant must show by clear and decisive proof -

"First: That the defendant has made a representation in regard to a material fact;

"Secondly: That such representation is false;

"Thirdly: That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

"Fourthly: That it was made with intent that it should be acted on;

"Fifthly: That it was acted on by complainant to his damage; and,

"Sixthly: That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true." (Underscoring added).

As the croppers were named on the face of the Offer itself, it is hard to perceive upon what theory it could be maintained that there had been reasonable reliance placed upon false or fraudulent representations as to the existence or nonexistence of lienholders or other interested person, unless, possibly, there were in addition to the croppers named, other interested persons who were not disclosed and whose written consent had not been obtained.

However, in some circumstances reliance may be placed upon paragraph 4 of the Offer, where the producer stated that he had obtained the written consent of lienholders or would obtain the same before taking the cotton out of production and/or before receiving any benefit accruing under the contract. It might be argued that this provision, alone, amounts to nothing more than a promise to obtain the written consent of lienholders prior to such time or action. Breach of a promissory representation, or failure to keep a promise made with reference to the transaction will not ordinarily warrant rescission of a contract. It is almost universally agreed by authorities that false representations, in order to justify rescission, must relate to some past or present fact or state of facts, and not to that which will or may occur in the future. Statements as to future action, or future results or effects, generally are no more than expressions of opinion. Another reason assigned in support of this rule is that a prediction, assurance as to future occurrences, or even a promise, cannot possibly be untrue at the time when made, and therefore cannot be technically a "false" representation.

However, the general rule as to promissory representations quoted above is subject to the well-established exception that, where the complainant relied upon such representation and where he can show that the party making the representation had no present intention of carrying out his promise, the misrepresentation of the promisor's state of mind will be considered such fraud as will justify rescission of the contract.

For instance, in the case of Mutual Reserve Life Insurance Company v. Seidel, 113 S. W. 945 (Court of Civil Appeals, Texas, 1908), action was instituted against a life insurance company to rescind a contract of insurance. At the time plaintiff made his application, he alleged that defendant agreed that plaintiff would be able to reject the policy and that the note which plaintiff executed and delivered to defendant would be void. Plaintiff, however, later learned that defendant, contrary to his promise, had negotiated the note. Plaintiff also rejected the insurance policy. The court stated:

"* * *. It is the general rule that a promise to perform some act in the future will not amount to fraud in the eyes of the law; and although it may have been the propelling inducement to the execution of the contract, and though it may have been totally disregarded, it could not be made the basis for a rescission. There is, however, an exception to the rule recognized in Texas, in this: that if at the time the promise is made it was the design and intention of the party making it to disregard it, and

no intention to perform it, and it was only made to deceive and entrap the other party, then such promise in case the refusal to perform took place would amount to such actual fraud as would justify and authorize the rescission of a contract induced by such promise. * * * In this case, while there is no direct prayer for rescission, the effect of granting the relief sought by appellee is to destroy the contract of insurance, and render it null and void. It is to all intents and purposes a suit to rescind the insurance contract and return the premium paid by appellee. The facts in this case indicate clearly that the promise to hold the note was made by Underwood with no intention to hold it, but that it was made with the deliberate intention to mislead appellee, and entice him into giving a note which Underwood intended at the time to negotiate and place in the hands of an innocent purchaser. This is borne out by the fact that he sold the note at once and disappeared, and nothing could be definitely ascertained as to what became of him." (Pp. 946, 947).

Likewise, in the case of Zuckerman V. Geller, 142 Atl. 344 (N.J. 1928) plaintiff sued to rescind a contract on similar grounds. He alleged that he purchased a plant from the defendant and that at the time of the purchase, defendant promised plaintiff to supply plaintiff with manufacturing work for one year. Plaintiff alleged, however, that defendant failed to keep this promise to supply him with the work. Plaintiff thereupon demanded the return of the purchase money and the surrender of certain notes in connection with the purchase of the plant. The court, in granting plaintiff the relief demanded, stated:

"* * * The defendant had no intention of carrying out his promise; it was intentionally false to deceive the complainant. A representation of an intention is a representation of an existing fact, and, if false, is actionable. Roberts v. James, 83 N.J. Law, 492, 85 A. 244, Ann. Cas. 1914B, 859. 'To recover', says Lord Bowen in Edgington v. Fitzmaurice, L.R. 29, C.D. 483, 'there must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It may be difficult to prove the state of a man's mind at a particular time, but, if it can be ascertained it is as much of a fact as anything else. A misrepresentation as to the state of a man's mind is therefore a misstatement of fact.'" (P. 345)

In accordance with the rule set forth, if the Secretary can show that the producer, at the time of entering into the contract, had not received the consent of the listed lienholders, and had no intention of securing their consent, he is entitled to rescind the contract.

I - C

The Secretary May Rescind the Contract Where the Producer
Falsely Certified That He Had Obtained the Consent of All
Lienholders

The producer is required to file a certificate of performance which states, among other things, that the producer has obtained and transmitted, or is transmitting with the certificate, the written consent of all holders of liens on his cotton crop on the land taken out of production, and that he has duly performed all other terms and conditions on his part to be performed under his contract with the Secretary of Agriculture. It is clear from the offer, the certificate, and the Regulations that failure on the part of the producer to obtain the consent of all lienholders constitutes a breach of the Cotton Contract.

It is true that generally, rescission cannot be had for a breach of contract, for ordinarily an adequate remedy for such breach can be had in an action at law. But where the breach is of such a nature that it is so indispensable a party of what the parties contracted for that the contract would not have been made with that condition omitted, then equity will grant relief by way of rescission.

Thus in the case of Hurst v. Champion, 244 Pac. 419 (Okla. 1925) plaintiff sued to rescind certain contracts. Plaintiff alleged that he contracted with defendant to make certain deeds of land upon defendant's promise to construct and operate an electric railway. Plaintiff alleged that defendant no longer operated the railway and had abandoned it. Claiming, therefore, an entire failure of consideration, plaintiff contended he was entitled to a cancellation of the contracts and a removal of the cloud from the title to the land involved because defendant placed the contract for the deeds on record. It seemed that the defendant had not obtained enough revenue from the road and had ceased its operation. The court, in granting plaintiff the relief requested, stated:

"In Black on Rescission and Cancellation, par. 213,
it is said:

"But the true rule appears to be that rescission or cancellation may properly be ordered where that which was undertaken to be performed in the future was so essential a part of the bargain that the failure of it must be considered as destroying or vitiating the entire consideration of the contract, or so indispensable a part of what the parties intended that the contract would not have been made with that condition omitted."* * *

"The contract here is an executory contract, and the possession of the land has never passed out of the plaintiffs.

"In Black on Rescission and Cancellation, par. 196, it is said:

"But aside from questions of fraud, it is a general rule that if a contract is entire and remains executory in whole or in part, and one party fails to perform what it is his duty to do under the contract, and the other party is not in default, the latter may rescind the contract." (pp. 421, 422).

This is in accordance with the general rule that equity may rescind a contract for a breach of the contract where such relief will furnish the plaintiff the most satisfactory remedy. Thus in Briggs v. Robinson, 256 Pac. 639 (Colo. 1927) the court held that a contract to build a house was properly rescinded where, after work had begun, it was clear that the house was being built improperly. In that case it also appeared that as the work progressed, and during the performance of the contract, defendant repeatedly promised to correct the defective work. But the court held that

"Defendant's conduct during the short time that he was engaged in the performance of the contract indicated to the mind of the trial court, at least, an intention not to execute the contract in its essential terms. The plaintiff was not required further to trust him, so the trial court found, to do in the future what he had failed to do in the past. And the defendant's promise to conform to the contract in the future was tardy and made only after he was detected in its violation in the past. This case is merely one where the trial court was abundantly justified in finding that there were equitable grounds for rescission of the contract."

As the court stated in the recent case of Sinclair Refining Co. v. Davis, 171 S.E. 150 (Ga. 1933):

"A breach of a contract as to a matter so substantial and fundamental as to defeat the object of the contract may authorize a rescission of the contract by the opposite party."

Obtaining consent of all lienholders is a condition precedent to the obligation of the Secretary to make benefit payments to the producer. Although it might not be performed until after the contract had been entered into, the performance of the condition was an essential part of the consideration for which the Secretary was bargaining. In Lauer v. Raymond, 190 Appellate Division, 319, 180 N.Y. Supplement 31 (1920), it was held that a party who had bought stock in a corporation upon condition that certain persons should not thereafter become interested in the corporation was entitled to rescind upon breach of the condition, and recover back the money paid for the stock.

While the matter is not wholly free from doubt, breach of the condition in obtaining consent of all lienholders would appear to be sufficient breach to support an action for rescission against the producer.

The Government would not have entered into the contract in the absence of such a condition. Nor is it clear that an adequate remedy exists at law. Since the Government was not bargaining for any consideration of direct pecuniary value, an action for damages for breach of the contract might well prove fruitless. The damages would be impossible of calculation. The fairest and most equitable determination of the controversy would, therefore, be to grant the Government's bill for rescission, and settle all equities in a single decree so as to protect the interests of all the parties.

It is possible that the filing of a false certificate stating that the consent of all lienholders had been obtained would also ground an action for rescission based on fraud. It is true that, ordinarily, misrepresentations must have been made at the inception of the contract in order to support a bill for rescission. But it is stated in Sec. 73 of Black on Rescission and Cancellation, that: "This rule is perhaps too strict." And in the present situation the circumstances that the Government clearly relied upon the producer's certificate, and that pecuniary damages may not afford an adequate remedy, might well justify rescission based upon fraud in the certification. While no decisions directly supporting such a theory have been found, there is at least a strong possibility that the courts might recognize the theory's essential justice, and grant rescission.

I - D

Where Producers, Through Fraud or Duress, Obtain Written Consent From Croppers Who are Named in the Offers, the Secretary May Sue in Equity to Rescind the Contracts.

The problem presented by the fourth portion of question "I" involves determination of remedies open to the Secretary where 1933 cotton producers named croppers working the land but procured their written consent by fraud or duress. A discussion of the rights of such croppers against the defrauding producers is unnecessary, and will not be undertaken.

When one of these producers submitted the written consent of his croppers he represented, at least impliedly that such consent was legally obtained, and that no fraud or duress has been practiced in procurement thereof. In other words, he represented the genuineness of the consent provided. He knew that reliance would be placed upon such consent; and that if the Secretary had knowledge of the fraud or duress, he would not accept the Offer and enter into the contract. The producer's silence, under the circumstances, was tantamount to a representation that he was submitting the kind of consent required, and that the Secretary could safely rely upon the same. Such a producer could not maintain that the manner in which the croppers were induced or forced to give consent was unimportant. He was plainly under a duty to speak and to disclose the material facts. The real aim of such a producer was to obtain money from the Government, and to do so he resorted to fraudulent methods. The element of fraud or misrepresentation pervades the entire transaction and

taints his dealings with the Government, as well as his dealing with croppers. Considering the nature of the transaction and the relationship of the parties, it might be forcefully argued that all the duties of a fiduciary were imposed upon this producer and he was clearly under a duty to disclose the true situation.

Even though the conclusion should be reached that there had not been such a fraudulent representation as would afford the Government the right to have the contract rescinded, it might be shown that there was such a mistake as would justify rescission. In Section 1497 of Williston on Contracts, Vol. III (1922) it is stated that the importance of distinguishing whether the transaction can be called fraudulent as distinguished from one based on mistake without fraud, even where no other remedy than rescission is sought, lies in the fact that fraud as to any circumstances actually inducing a bargain may justify relief, while the mistake must be as to a matter which formed a fundamental basis of the bargain. In Section 1544 Williston lays down the principle that if there is a mistake vitally affecting a fact or facts on the basis of which the parties contracted, such mistake renders their contract voidable by the injured party. This, he says, is a sound principle of justice, and should be applied without any further question as to whether the mistake is intrinsic or extrinsic, or whether it affects identity of quality; and though there may be no mistake as to the identity of a thing to which a contract relates, the basis of the bargain may so clearly be that the thing in question possessed certain qualities, or would fulfill a certain purpose as to make it inequitable to enforce the bargain if this assumption is not free. Clearly it was assumed in these cases that each producer was submitting consent legally obtained.

There appear to be no equities in these cases against the United States in favor of the defrauded croppers, but the existence of such equities or a liability for the destruction of crops in which the croppers had interests is not necessary to establish injury or damage to the United States so as to warrant rescission of the contracts. The United States, relying upon the representations that these producers had legally and without fraud or duress obtained the consent of the croppers, entered into the contract, and paid out money thereunder. While there is no question as to performance under the contract, as the crop in every instance had been destroyed and the Government is under no legal obligations to such croppers, the same elements of injury or damage are present here as were noted in discussing the first portion of this question.

As a supplementary suggestion, it may be noted that, if it is correct to say that share-croppers working the cotton land taken out of production under these contracts were equitably entitled to share in the benefit payments, in proportion to their interest in the destroyed cotton, a court of equity, at the instance of the Government, might impress a constructive trust in the money in the producers' hands for the benefit of the croppers, and in order to effectuate such a decree issue a mandatory injunction to compel payment of a portion of the money to such croppers. In such case, the court might well proceed upon the theory that the Government has a right to insist upon and compel the transmission of this money to those entitled to receive it.

II

The United States May, in any of the Above Situations, Institute an Action Under Section 231 of Title 31 of the United States Code to Recover Civil Damages Against the Producer.

Section 231 of Title 31 of the United States Code provides:

"Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section 80 of Title 18, shall forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Section 80 of Title 18 U.S.C.A., referred to in the above statute, provides:

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be fined not more than \$10,000, or imprisoned not more than ten years, or both."

It is provided in sections 232, 233, 234, and 235 of title 31 U.S.C.A. that for violations of section 231 suit may be instituted either by the United States, or by individual persons for themselves as well as the United States, and where such suit is brought by individuals they are entitled to receive one-half of the amount of the forfeiture and one-half of the damages recovered and collected.

It has been held that the remedy given by these sections is merely cumulative and that the right of the United States to sue for the recovery of money obtained from it by means of fraudulent claims existed at common law. Thus the court in Pooler v. United States, 127 Fed. 519, held that the United States could in seeking to recover amounts wrongfully received by a person as an alleged pensioner, elect to sue either at common law or bring an action under the above statutory provisions. It was also pointed out that the remedy given by these sections

"Is strictly penal, and not only so, but qui tam, and therefore under no rule of interpretation can it be regarded as superseding the prior right of the United States to proceed at common law."

The terms of Section 80 of Title 18 of the Code appear to cover all of the situations discussed in Point 1. In all of those cases the producer has either presented a fraudulent claim for payment, or has concealed a material fact in order to obtain or aid in obtaining payment or approval of a claim.

III

The Secretary May, in any of the Above Situations, Withhold Payment of the Option-Benefit.

Section 300 of the Cotton Regulations, Series 1, provides that if the Secretary enters into a "cotton contract" with or without knowledge of the fact that the producer has not procured the consent of all lienholders and/or other interested parties, he shall have the right to withdraw from the contract at any time, or to withhold "benefit payments" until consent is obtained or the matter is otherwise adjusted. In Section 100 of the Regulations "cotton contract" is defined as including option contracts, benefit contracts, and option benefit contracts. While there are some distinctions to be made between option contracts and benefit contracts, and also contracts involving both the option and benefit features, it is obvious that there is only one transaction involved in all of these cases. Under the 1933 program the producer was privileged to elect whether he would take compensation solely in cash or partly in cash and part in the form of an option on government cotton, upon which option it was expected he would realize some "profit". It is submitted that in both cases the nature of the payments made is the same, even though the option settlement represents so-called "profit" from the sale of the option contract.

In all of the situations discussed in question "I" where there has been a failure to obtain the written consent of all lienholders and/or other interested parties, the Secretary may withdraw from the contract completely, and such withdrawal will carry with it the withholding of all further payments thereunder. If the Secretary does not choose to withdraw, however, Section 300 authorizes him to withhold "benefit payments" pending an adjustment of the matter. In Section 100 (d) of the Regulations a "benefit payment" is defined as being a

cash payment made to the producer in consideration of acreage reduction. In Subsection (e) "option-benefit", however, is defined as being a cash payment as defined in (d) in combination with a cotton option contract. A technical interpretation of the words "benefit payments" would seem to deny the right of the Secretary, under Section 300, to withhold option benefits pending the procurement of consent or other adjustment of the matter.

Where, in any of the situations discussed, the Secretary obtains rescission of the contract, the equity court in attempting to adjust the equities of the parties could make provision for the disposition of the option settlement. It is believed that even though the court granted rescission of the contract, it might require the Secretary to pay proportionate parts of the option settlement to the interested croppers, and in some cases, might direct payment of the remainder of the option settlement to the producer.

As has been seen, Section 8 (1) of the Agricultural Adjustment Act authorizes the Secretary to provide for rental or benefit payments in connection with acreage reduction or reduction in production for market, either through agreements with producers "or by any other voluntary methods". Where the Secretary withdraws from the contract completely, withholding payment of the option settlement, or where an equity court in granting rescission of a contract does not undertake to authorize or direct the payment of any portion of the option benefit to the croppers involved, it is submitted that under the above provision of the Act, the Secretary probably would be authorized to make payments to croppers. This method of adjusting the difficulties presented under these contracts seems to be entirely consonant with Section 300 of the Regulations.

IV

The Secretary May Set Off all or any Part of the Benefit Payment Made Under a 1933 Cotton Contract, Under any of the Circumstances Listed in Question 1, Against Amounts due the Producer Under a 1934 Cotton Contract.

In an opinion dated August 8, 1933, the Acting Attorney General of the United States advised the Secretary of Agriculture that there is no requirement of statute that debts due the United States by farmers be set-off against rental or benefit payments. It was pointed out that by virtue of the re-enactment on March 3, 1933, of Section 227 of Title 31, U.S.C.A. the duty of making set-offs was limited to judgments. Prior to that time, under the Act of March 3, 1875, 18 Stat. 481 the accounting officers were required to make set-offs in respect to both judgments and claims. Section 227 of Title 31 U.S.C.A. as amended on March 3, 1933, provides as follows:

"When any final judgment recovered against the United States or other claim duly allowed by legal authority; shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be

indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set-offs, and discharges his judgment or an amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff or claimant denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment or claim, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Secretary with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

In his opinion the Acting Attorney General said

"The right of the United States to withhold or set off money due to a person against a debt due by such person to the Government has been recognized and exercised since the early days of our Government. It is not dependent upon the existence of a statute, but is the common right which belongs to every creditor to apply moneys payable by him to his debtor in settlement of sums due him by the debtor."

The following quotation from Gratiot v. United States, 15 Pet. 335, 370 (1841) was given in support of the foregoing statement:

"The United States possess the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balances due to them by the defendant, on any other account, whether owed by him as a private individual, or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him."

Admitting the general right of the United States to set-off money due persons against debts owed to the United States, it may then be asked: Are these producers debtors of the United States? Does the United States

have such a claim against these producers before ^{any} action is taken to have the contracts rescinded as to entitle it to withhold or set-off money due under other contracts against the benefit payments made under the 1933 contract. The United States of course does not have to reduce its claim to judgment before then can be a set-off; it seems to be sufficient if the Government takes the position that there is money due it.

It is well settled that where a person is indebted to the Government under one contract, the Government may set-off without separate action an amount owing by that person under another contract. See Barry v. United States, 229 U. S. 47; Emery v. United States, 13 F (2d) 658; and Taggart's Case, 17 Co. Cl. Rep. 322. In the Barry case contractors failed to deliver coal in accordance with the terms of their contract. The Government purchased coal to meet its immediate needs, which coal had a fuel value of \$3193.32 less than that which the contractors were to deliver. This amount the Government retained from money due the contractors under a later contract. In affirming judgment for the Government the court held:

***"The liability might have been asserted by the Government in an action; but it might, as it did, charge it up as a set-off against its own liability. It would be folly to require the Government to pay under the one contract what it must eventually recover for a breach of the other."
(Page 53 of opinion)

V

Any money recovered from the producers under the circumstances listed in Question 1 should be credited to the appropriation from which the benefit payments were made.

Section 484 of Title 31 of the United States Code provides:

"The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department. (R.S. § 3617)"

This section of the Code has been construed to require that all money received on account of the Government, except where otherwise provided by law, shall be covered into the Treasury as miscellaneous receipts. 1 Decisions of the Comptroller of the Treasury 568; 7 Decisions of the Comptroller of the Treasury 852. Therefore, if Section 484 is applicable to the payments recovered from producers, the moneys are to be

covered in the Treasury as miscellaneous receipts and consequently are not to be withdrawn or applied except in consequence of a subsequent appropriation made by law. See 20 Decisions of the Comptroller of the Treasury 349; 22 Decisions of the Comptroller of the Treasury 314; 2 Decisions of the Comptroller-General 599; However, I am of the opinion that, under the decisions of the Comptroller General, the Code section does not apply to the benefit payments. In 6 Decisions of the Comptroller General at page 338, the following general rule was restated with approval:

"In 5 Comp. Gen. 736, in which reference was made to sections 3617 and 3618, Revised Statutes, providing that any money received for the use of the United States shall be turned into the Treasury as miscellaneous receipts and that the money thus covered can not be withdrawn therefrom, except in consequence of a subsequent appropriation made by law, it was stated:

"In the practical application of these provisions of law it has been the accepted and uniform rule of the accounting officers in the past to hold that any money collected for the use of the United States is properly for credit as miscellaneous receipts if it is collected under some general law or statute as a penalty; 23 Comp. Dec. 352; a set-off, 20 Comp. Dec. 349; indemnities for public goods lost by carriers, 22 Comp. Dec. 279; id. 703; 2 Compt. Gen. 599. On the other hand, if the collection involves a refund or repayment of moneys paid from an appropriation in excess of what was actually due such refund has been held to be properly for credit to the appropriation originally charged; 18 Comp. Dec. 980; 2 Comp. Gen. 599; provided the crediting of such moneys will not operate to augment the original amount appropriated by the Congress for the purposes for which the appropriation was made. 22 Comp. Dec. 314. See also 18 Comp. Dec. 430 and 22 id. 297."

The question presented to the Comptroller-General involved the problem of the proper disposition of a sum of money received by the Department of Justice from the receivers of the Butterworth-Judson Corporation in settlement of a judgment covering certain claims filed by that Department on behalf of the War Department for the recovery of moneys advanced from a War Department appropriation in connection with wartime contracts. The Attorney-General had contended that where payments were made pursuant to a judgment of a United States court the funds "should be deposited under the Department of Justice to the credit of the fund entitled 'Fines, Penalties and Forfeitures' excepting in cases where for some special reason, such as crediting a current appropriation, credit is necessarily given otherwise." It is clear from the decision that the Attorney-General in effect contended that the moneys should be covered in the Treasury

as miscellaneous receipts, using the term "Fines, Penalties and Forfeitures" merely to designate a portion of the miscellaneous receipts. However, the Comptroller-General ruled that the moneys should be credited to the appropriation from which they were originally advanced and made clear the distinction between moneys to be paid into the Treasury as miscellaneous receipts and those to be credited to appropriations by declaring:

"Hereafter, when moneys are deposited by the Department of Justice as fines, penalties, and forfeitures, there should be required, before covering such moneys into the Treasury, a statement of facts from which a determination can be made as to whether the moneys in fact represent fines, penalties, or forfeitures, or whether they represent recoveries of moneys theretofore illegally or erroneously paid from appropriated funds." (at page 339).

Added weight should be given to this decision by reason of the fact that the appropriation from which the funds were originally advanced had lapsed and the moneys were thus at once carried into the surplus fund in the Treasury by operation of law.

Other decisions of the Comptroller involving slightly different facts appear to be even stronger authority to the effect that the benefit payments recovered from the producers are not to be covered into the Treasury as miscellaneous receipts. Thus, the situation has frequently arisen wherein contractors have defaulted and the contract is completed under contracts with other contractors at a cost greater than that named in the original contract, with the bondsmen of the defaulting contractors thereafter paying the difference representing the loss or damage sustained by the Government by reason of the default. The Comptroller of the Treasury has consistently ruled that the amounts so paid by the bondsmen are not moneys received for the use of the United States within the meaning of Section 484 of the Code and thus the moneys are to be credited to the appropriation under which the contracts are performed rather than deposited into the Treasury as miscellaneous receipts. 16 Decisions of the Comptroller of the Treasury 384; 21 Decisions of the Comptroller of the Treasury 107; See also 18 Decisions of the Comptroller of the Treasury 430; 18 Decisions of the Comptroller of the Treasury 528.

Applying the principles set forth in the above decisions to the instant facts, I am of the opinion that the benefit payments recovered from the producers under the circumstances listed in Question 1 should be credited to the appropriation authorized by Section 12 of the Agricultural Adjustment Act. The moneys involved clearly do not represent fines, penalties or forfeitures, but represent recoveries of money erroneously paid out from an appropriation by reason of the fact that a producer has presented a fraudulent claim or has concealed a material fact.

VI

Any money recovered under Section 231 of Title 31 of the United States Code in excess of the amount paid out from the appropriation for benefit payments should be covered into the Treasury as miscellaneous receipts; the question as to the disposition of the funds recovered in an amount equal to the moneys paid out from the appropriation is an appropriate one for determination by the Comptroller-General.

The conclusion was reached under Point II that the United States may, in any of the situations listed under Question 1, institute an action under Section 231 of Title 31 of the United States Code to recover civil damages from the producer. The narrow question here considered concerns the disposition of the moneys thus recovered. It is well established that penalties are moneys collected for the use of the United States within the meaning of Section 484 of Title 31 of the United States Code and must therefore be credited as miscellaneous receipts. 23 Decisions of the Comptroller of the Treasury 352; 6 Decisions of the Comptroller-General 337. In the first cited decision it was held that the amount of a penalty collected on the bond of a successful bidder for failing to enter into a formal contract should be covered into the Treasury as miscellaneous receipts rather than to the credit of the particular appropriation involved. Moreover, it is clear that Section 231 of Title 31 of the Code is a penal statute. Pooler v. United States, 127 Fed. 519 (1904). As pointed out in the Pooler case the remedy provided by Section 231 is not only "strictly penal" but also "qui tam". Moreover, the remedy is cumulative and the right of the United States to sue for the recovery of moneys obtained from it by means of fraudulent claims existed at common law. I am therefore of the opinion that any money recovered under Section 231 of the Code in excess of the amount erroneously paid out from the appropriation for benefit payments should be covered into the Treasury as miscellaneous receipts. In this connection, it should again be noted that the crediting of moneys to an appropriation must not operate to augment the original amount appropriated by Congress for the purposes for which the appropriation was made. 22 Decisions of the Comptroller of the Treasury 314; 6 Decisions of the Comptroller-General 337.

A much more difficult question arises as to the proper disposition of the funds recovered under Section 231 in an amount equal to the moneys erroneously paid out from the appropriation for benefit payments. It may, with considerable force, be urged that the moneys should be paid to the appropriation from which the moneys were originally advanced. Persuasive to this view is the fact that recovery by the United States under Section 231 of the Code is apparently a bar to a common law action to recover the moneys paid out. Pooler v. United States, supra. On the other hand, it may be urged that the primary purpose of the Code provision appears to be to provide a penalty rather than to establish a means whereby to refund moneys erroneously paid out from an appropriation. As the Comptroller-General seemingly has made no ruling on a question of this nature, I am of the opinion that the question as to the disposition of the moneys here in question should be presented for his determination before any final action is taken.

Francis M. Shea,
Chief, of Brief and Opinion Section,
Office of the General Counsel.

No. 74

NECESSITY FOR BIDS IN PURCHASES FOR
EMERGENCY PROGRAM

In purchasing seeds with funds allocated to him for expenditure by the Executive Order of June 23, 1934, the Secretary, unless otherwise directed by the President, need not advertise for bids but may make purchases in the open market.

Opinion Section Memorandum No. 117
Dated July 9, 1934.

July 9, 1934.

MEMORANDUM TO COL. PHILIP G. MURPHY,
ASST. DIRECTOR, DROUGHT RELIEF SERVICE.

Replying to your memorandum of June 20, I submit herewith my opinion on the following:

QUESTION

May the Secretary, in purchasing seeds with funds allocated to him for expenditure by the Executive Order of June 25, 1934, direct that such purchases be made in the open market, at current market prices, or otherwise?

OPINION

In the Expenditure of such funds for emergency and relief purposes, the Secretary, unless otherwise directed by the President, need not advertise for bids but may make purchases in the open market.

DISCUSSION

By the "Emergency Appropriation Act, fiscal year 1935," approved June 19, 1934, the sum of \$525,000,000 is appropriated "to meet the emergency and necessity for relief in stricken agricultural areas." Title II of the Act provides that this sum shall be allocated by the President for certain specific purposes including "the purchase, sale, gift, or other disposition of, seed, feed, freight, summer fallowing and similar purposes."

The Act further provides with respect to this appropriation that

"expenditures hereunder and the manner in which they shall be incurred, allowed, and paid, shall be determined by the President, and may include expenditures for personal services and rent in the District of Columbia and elsewhere and

for printing and binding and may be made without regard to the provisions of section 3709 of the Revised Statutes."

Pursuant to the authority vested in him by the Act, the President by Executive Order No. 6747, dated June 23, 1934, has made allocations to various governmental agents and agencies, including the sum of \$43,750,000 "to the Secretary of Agriculture or such agency as he may designate for the purchase, sale, gift, or other disposition of seed, feed, and livestock, and for transportation thereof."

The Executive Order contains no direction as to the manner in which expenditures shall be incurred by the Secretary. It is, however, specifically provided in the Act itself that such expenditures "may be made without regard to the provisions of Section 3709 of the Revised Statutes." This is the section of the Revised Statutes which requires that Government purchases be made pursuant to public bidding, and reads in part:

"Except as otherwise provided by law all purchases and contracts for supplies or services in any of the departments of the government and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles or performance of the service." (Title 41, Section 5 - U.S.C.A.)

The Emergency Appropriation Act, in providing that expenditures for emergency relief and the manner in which they shall be incurred shall be determined by the President, sets no limit upon the procedure which he may require to be followed in making purchases from the funds appropriated. It is thus open to him to direct that purchases be made only after public bidding. In the absence of such direction, however, those authorized to make purchases from the sums allocated to them are subject to no such requirement, since Congress itself has acted to relieve them of the necessity of compliance with the terms of Rev. Stat. 3709. The provision in the Act that "expenditures....may be made without regard to the provisions of Section 3709 of the Revised Statutes" is not made dependent upon authorization by the President but is unqualified.

It may be noted that Section 3709 itself provides that:

"When immediate delivery or performance is required by the public exigency, the articles or service may be procured by open

purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

The present acute emergency is no doubt one creating a condition of "public exigency" which would justify proceeding under the exception provided for in Section 3709 were controlling. See American Smelting Co. v. United States, 259 U.S. 75, 78 (1922). To sustain purchases under such an exception, however, it must appear that there has been an actual exercise of discretion by the administrative officer responsible for the purchase in determining the existence of a condition of public exigency. United States v. Speed, 8 Wall. 77 (1866). In the present instance Congress itself has determined that a condition of emergency exists and has acted to except purchases made from the funds appropriated for relief purposes from the provisions of the statute requiring public bids. It is therefore my opinion that the Secretary in making purchases of seeds from the sums allocated to him by the Executive Order of June 23, 1934, may, in the absence of contrary direction by the President, proceed without regard to the provisions of Section 3709 of the Revised Statutes and may make such purchases in the open market.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 75

RETURN OF TOBACCO ACREAGE REDUCTION

CONTRACTS

Offers to enter into tobacco acreage reduction contracts, although signed by the producer, do not become binding upon their receipt by the Secretary, but only upon acceptance by him; accordingly, until so accepted, there is no legal objection to their being returned to the county committee in order that adjustments and corrections can be made.

Opinion Section Memorandum No. 111
Dated July 10, 1934.

July 10, 1934.

MEMORANDUM TO MR. WARD M. BUCKLES

Director of Finance

Mr. Frank has referred to me your memorandum dated July 9, 1934, in which you state that approximately 2,000 tobacco contracts are being held in the Rental and Benefit Audit Section of the Comptroller's Office "because of various questions in connection with these contracts". You further state that Mr. J. B. Hutson, Chief of the Tobacco Section, has requested that these contracts be returned to his office so that he may return them to the County Committees and have them adjusted, but that you understand that the Comptroller's Office hesitates to permit this procedure because they feel that there is some question whether or not they may legally permit these contracts to be returned, inasmuch as "they are presumed, upon receipt, to be a contract between the producer and the Secretary of Agriculture". You suggest that, unless there is some legal objection, it might be well to permit the return of these contracts so that adjustments and corrections can be made.

The offers to enter into Tobacco Acreage Reduction Contracts stipulate that they shall become binding contracts upon acceptance by the Secretary of Agriculture. They therefore do not become binding contracts upon mere receipt, but only upon acceptance by the Secretary. Until they have been accepted, there is no legal objection to their being returned to the County Committee in order that adjustments and corrections can be made. I am informed by Mr. Payne that his office is now engaged in examining the contracts in question, and that he will offer no objection to the return of such contracts as have not been approved to Mr. Hutson.

The contracts which have been approved constitute, of course, legal obligations running to the United States. No officer can waive, cancel or modify these contracts where such action would be in any respect prejudicial to the interests of the United States. The contracts themselves evidence these obligations, and, as a matter of good accounting practice, it may in any case be inadvisable to return the originals to the County Committees.

I am advised by Mr. Payne that his staff is engaged in a study of the contracts which are being held in his office, and that he will shortly be in a position to furnish information with respect

to the particular objections which are being made to carrying out or making payments under these contracts. Pending receipt of such information, I do not feel that I am in a position to advise you that the Comptroller's Office should return these accepted contracts to Mr. Hutson or to the County Committees. Upon the receipt of further information from Mr. Payne, I may perhaps be able to advise you further.

Francis M. Shea,

Chief of Brief and Opinion Section,
Office of the General Counsel.

No. 76

USE OF FUNDS TO DEFRAY EXPENSES UNDER
SUPERSEDED LICENSE

The market administrator under the new milk license for the Greater Boston Market (License #38) may not make expenditures with respect to either of two types of expenses incurred by the milk director under the old license.

Opinion Section Memorandum No. 112
Dated July 10, 1934.

July 10, 1934.

MEMORANDUM TO MR. OPPENHEIMER

This is submitted in response to your memorandum of May 24, forwarding for answer to the problems therein proposed a letter addressed to Mr. Wicker, Chief of the Field Investigation Section, by Mr. F. B. Lyon, Field Representative, dated May 15, and referred to the Office of the General Counsel through Mr. Christgau.

Question Stated

License No. 15 (hereafter called the old license), a license for milk in the Greater Boston Market, was issued by the Secretary of Agriculture to be effective November 3, 1933, and was officially terminated by him as of March 15, 1934. License No. 38 (hereafter referred to as the new license) was issued by the Secretary of Agriculture on March 15, 1934, to supersede License No. 15. The question you ask is whether the Market Administrator under the new license may make expenditures with respect to either of two types of expenses incurred by the Milk Director operating under the old license: (a) The cost of computing and closing out the pools operated under the old license, and some special work involved in establishing bases and (b) the office, rent, and salary expenses of the Milk Director.

Answer

It is my opinion that the new license confers no power on the Market Administrator to pay off expenditures of either type specified above. The whole tenor of the old license and relevant sections in the new license indicate that it was contemplated that the Milk Director himself make a final adjustment of his own expenditures.

Discussion

In Exhibit A, Section D, 1, 2 of the new Boston Milk License, two types of deductions from payments to producers are required of distributors subject to the License. The first kind of deduction

is demanded from distributors with respect to all milk delivered to them by producers, whereas the second kind of deduction is demanded from distributors with respect to such milk as is delivered to them by producers who are not members of an association of producers approved by the Market Administrator. Subsection 4 of the same section deals with the apportionment of the moneys collected pursuant to subsections 1 and 2. It leaves no doubt but that the first type of deductions are to "be retained by the Market Administrator to meet his cost of operation". (underscoring ours.) Subdivision (b) thereof, dealing with deductions of the second type, although prima facie susceptible of a more liberal construction must, I think, upon an analysis of both licenses, be construed equally as narrowly. These latter payments are to be expended by the Market Administrator,

"for the purpose of securing for the producers who are not members of an Association, market information, supervision of weights and tests and guarantee against failure of distributors to make payments for milk purchased;" (p. 17)

As to all three above-cited objectives it seems self-evident that no payments were contemplated to recompense activities in connection with the old license. The market information would have little utility unless based on current market reports. Supervision of weights and tests would not be aided by any past actions of the Milk Director, and the guarantee provision likewise seems definitely pointed to future operation. In addition, these objectives are to be secured for classes of people who are specifically defined in the new license in a manner dissimilar to the definition of similarly denominated classes in the old license. (see infra. pp. 8 and 9, on "distributors" and "producers".)

Other language in the new license (Section E, 1 and F of Exhibit A) reinforces the viewpoint that the Market Administrator was intended to meet only expenses incurred by himself. Furthermore, Section E of Exhibit A, dealing with the Market Administrator's duties and compensation, sets forth, as supplementary to the compensation of the Market Administrator himself and the Market Administrator's cost of operation, the right of the Market Administrator,

"to incur such other expenses, including compensation for persons employed by the Market Administrator as the Market Administrator may deem necessary for the proper conduct of his duties." etc. (p. 18)

Thus, even in the midst of a broader enumeration of purposes for which the Market Administrator may disburse funds in his hands, there is still present every indication that the Market Administrator is restricted to incurring the expenses necessary for conducting his own office, and may not defray the expenses of the Milk Director.

This conclusion is reinforced by reference to other sections of the new license. II.8. and 9. almost conclusively prove that it was intended that the winding up of the old license should be accomplished by the Milk Director alone. These sections add the sanction of the new license to the obligations imposed by the old one.

"8. Each and every distributor shall fulfill any and all of his obligations which shall have arisen, or which may hereafter arise in connection therewith, by virtue of or pursuant to the License for Milk - Greater Boston Market issued by the Secretary on the 30th day of October, 1933 (hereinafter sometimes referred to as the "prior license"). (underscoring ours.)

"9. On or before the tenth day after the effective date of this License, each and every distributor shall furnish to the Director, referred to in the prior license and in the Marketing Agreement for Milk - Greater Boston Market, executed by the Secretary on the 30th day of October, 1933 or in the notice of termination of said prior license, complete and correct statements, on and in accordance with forms on file in the Director's office, of such distributor's receipts of milk and sales thereof as Class I and as Class II, respectively, as defined in the prior license (together with an itemized statement of the point of each shipment, and of all deductions from payments to producers in respect of such milk) during the respective periods: November 3-30, 1933, December 1-15, 1933, December 16-31, 1933, January 1-15, 1934, January 16-31, 1934, February 1-15, 1934, February 16-28, 1934, and March 1, 1934 to the effective date of the License, all dates inclusive.

"This paragraph is for the purpose of aiding said Director in the performance of his duties with respect to the obligations mentioned in paragraph 8." (p.5)

Of course the new sanctions imposed by these sections can have effect only as to distributors covered by the new license, who, as will be subsequently pointed out, constitute a much smaller class than those bound by the old license. To supplement this inadequacy, however, recourse can be had to the termination of the old milk license, effected by the Secretary on March 15, 1934, a document which necessarily affects all distributors falling within the scope of the original license. The termination was made pursuant to a reservation that

"any and all obligations which have arisen, or which may hereafter arise in connection therewith, by virtue of or pursuant to such License, shall be deemed

not to be affected, waived, or terminated hereby; and the Director referred to in such License and in the Marketing Agreement for Milk - Greater Boston Market, executed by the Secretary on the 30th day of October, 1933, and the person heretofore selected to hold such office, shall continue to have until further notice, the power and authority to perform his duties, as provided in such License, in respect of such obligations."

Since little doubt can be passed upon the power of the Secretary to continue in effect provisions or parts of a license, in such special circumstances as he deems advisable, the terms of the termination itself compel the conclusion that the Milk Director was to continue to perform his duties and that the obligation of the licensees under the old license was being kept alive in order to enable him to fulfill his obligations.

There are still other indications in the new license that the obligations incurred under the old license may not be satisfied out of funds collected under the new. If the Market Administrator had to pay the expenses of the Milk Director, it would be impossible for him to comply with the provisions of Exhibit A, Section E, 2, reading that

"The Market Administrator shall keep such books and records as will clearly reflect the financial transactions provided for in this License." (p.18)

The only official who has kept the appropriate books and records on the Milk Director's transactions is the Milk Director himself, since under III, 6, of the old Milk License, he was obligated to

"keep separate books and records in form satisfactory to the Secretary pertaining to such funds," (p. 27)

It may, therefore, be said that, since the apparatus for recording and accounting expenditures and payments under the old license was confided wholly to the Milk Director, the duty of making such payments devolved entirely upon him.

It should be noted throughout this discussion that the Market Administrator is required to

"execute and deliver to the Secretary his bond in such amount as the Secretary may determine, with surety thereon satisfactory to the Secretary, conditioned upon the faithful performance of his duties as such Market Administrator." (p. 18)

Although subsequent language in this section of the license seems to insure that the Market Administrator will not be held to too strict

a standard in his conduct, there is a possibility, at least, of liability if he goes out of his way to make payments which should have been made by the Milk Director. He is, therefore, justified in construing very strictly the objectives for which he can use funds committed to his care.

A comparison of the various objectives of expenditures under the two licenses reveals considerable limitation of range under the second license as contrasted with the first. The second license prescribes for the various deductions from payments to association members, that they go to meet the cost of operation of the license, and secures for those producers not members of an association certain specified benefits, to wit, market information, weight and test supervision, and guarantee against failure on the part of the distributors to make payments. The old license (see p. 27) confers on non-members of associations, in addition to what is given them under the new license, an entirely distinct benefit, i.e., advertising. It is not likely that payments which are being made for restricted purposes in the present are intended to cover broader purposes fulfilled at some time in the past.

Further consideration of the scope of the two licenses serves to render even more forceful the unreasonableness of expecting distributors under the new license to meet the obligations incurred under the old license. For one thing, the Greater Boston Market covered much more territory under the old license (see Exhibit B, p. 31). All of District 2 (North and South Shores) and District 3 (Cape Cod), which were covered by the old license, is omitted from the new one, and, in addition, the following cities and towns in District 1: Denvers, Lynnfield, Burlington, Bedford, Concord, Lincoln, Sudbury, Wayland, Weston, Framingham, Natick, Dover, Westwood, Norwood, Walpole, Foxborough, Sharon, Canton, Stoughton, Avon, Randolph, Holbrook, Hingham. (p.31) It is not to be expected that a court will allow the lesser number of distributors covered by the new license to bear the entire burden of expenses which were in part incurred in connection with districts now making no contribution for past services rendered.

Furthermore, the class which is subject to the new license has been changed on other than geographical lines. In the definition of distributor contained in I.B. of the new license, there may be noted certain variations from the definition contained in I.E. of the old license. In the first place, the old license dealt with the various persons engaged in the handling and distribution of "fluid milk", whereas the new license covers persons engaged in the handling, in various manners, of "milk or cream". Passing this distinction, there is a general similarity in the description of the persons coming within the category of "distributor" with the exception of

- (a). 1 (c), where the new license places within the "distributor" category persons,

"who operate stores, restaurants, hotels, or other establishments selling or serving for gain, milk or cream at retail for consumption off or on the premises," (p.2)

whereas the old license omitted those selling or serving milk or cream on the premises, and

(b). 2, the category of

"Persons who purchase, market, or handle milk or cream for sale in the Greater Boston Market." (p. 2)

who are classed as distributors under the new license but are not mentioned in the old license.

The net effect of these differences is to force a smaller class of persons to pay for expenditures which originally benefited a much larger class. It is extremely dubious that a license can be construed to permit such a result.

There is a further distinction in the two licenses with respect to the definition of producer which is of significance even though producers are not licensees. Producers are a class intended to be benefited by license provisions, and although technically it is the distributors who pay the required deductions to the Market Administrator, they are, after all, deductions from payments to be made to producers. In sum, we have the double difficulty of having distributors deducting from producers, both under the new license, payments to compensate for benefits conferred upon a different class of distributors and a different class of producers under the old license. Sections C and D, 4(c) of Exhibit A, also point to a totally new class, that of "new producers", who would be obligated to pay for benefits in which they had never shared under the old license.

Various other differences in policy and method under the two licenses might be adduced to prove that no carry-over of the obligations of the old license to the new one was intended, but in view of the above-submitted analysis, it does not appear necessary to go further into such differences. I can find no authorization or inference permitting the Market Administrator to expend any funds collected by himself in order to defray expenditures incurred by the Milk Director under the superseded License.

Francis M. Shea,
Chief of Brief and Opinion Section,
Office of the General Counsel.

No. 78

EMPLOYMENT OF THE PUERTO RICO COMPANY
AS AGENT OF THE SECRETARY

It is our opinion that the Secretary of Agriculture may, with the approval of the President, employ a corporation as his agent in the expenditure of monies held in a separate fund under Section 15(f) of the Agricultural Adjustment Act for the benefit of Puerto Rican agriculture. However, in view of the present conflict in the opinions of the Attorney General and the Comptroller General, the Secretary should make no commitment to turn over funds set aside under Section 15(f) to such a corporation, without first securing an opinion of the Comptroller General sanctioning such practice.

If such a corporate agency is endowed with powers in excess of those necessary to the performance of the functions vested in the Secretary under Section 15(f), the Secretary may not turn over to its funds, unless proper means are taken to insure the use of such funds for the purpose for which they are given.

Executive officers or departments of the Government empowered to employ, in the performance of their duties, such agencies of the Government as they may designate, may avail themselves of an agency designated to carry out the functions of the Secretary.

Opinion Section Memorandum No. 113
Dated July 11, 1934.

See also Opinion of the Attorney General dated September 19, 1934, in Appendix (A-8).

July 11, 1934.

MEMORANDUM TO MR. WENCHEL

QUESTIONS

In reference to the proposed incorporation of the Puerto Rico Company you have asked the following questions:

1. May the Secretary with the approval of the President direct that the proceeds of processing taxes held in separate fund in the name of Puerto Rico under Section 15(f) of the Act be turned over to the Puerto Rico Company, a Puerto Rican corporation, incorporated by special Act of the Puerto Rican Legislature to be expended by that corporation for the benefit of agriculture?

2. If the Secretary may use a corporate agency for the purpose of exercising the powers vested in him under Section 15(f) of the Agricultural Adjustment Act, as amended, does the fact that the corporate agency in question will be endowed with powers in excess of those necessary to the performance of the functions vested in the Secretary under Section 15(f) present any legal inhibitions to the use of this particular corporation for the purposes above stated?

3. Will the fact that this agency may be used by other executive officers or departments of the Government in performance of functions vested in them present any legal objection to its use by the Secretary of Agriculture?

OPINION

1. It is our independent judgment that the Secretary of Agriculture may, with the approval of the President, employ a corporation as his agent in the expenditure of funds for the benefit of Puerto Rican agriculture. However, in view of the present conflict in the opinions of the Comptroller General and the Attorney General, it is impossible for the Secretary to make any commitment to turn over funds set aside under Section 15(f) of the Act to such a corporation to be expended for the benefit of Puerto Rican agriculture without first securing an opinion of the Comptroller General sanctioning such practice.

2. However, where a corporate agency is endowed with powers in excess of those necessary to the performance of the functions vested in the Secretary under Section 15(f), the funds may not be turned over to it, unless proper means are taken to insure the use of the funds for the purpose for which they were given.

3. If other executive officers or departments of the Government have been empowered to employ, in the performance of their duties, such agencies of the Government as they may designate, then they may make use of an agency designated to carry out the functions of the Secretary.

DISCUSSION

1. The Attorney General of the United States in an opinion rendered to the Secretary of Interior on February 7 of this year approved the creation of a corporate agency to carry out certain of the functions vested in the Secretary of Interior by the President, in a case where the President had been explicitly granted the power to create or designate such agency or agencies as he thought necessary for the purpose of performing the functions vested in him. In support of this opinion the Attorney General relied on the fact that the courts had approved the creation of corporations in other instances where similar powers to create necessary agencies to carry out conferred powers had been granted by Congress. Both the Food Administration Grain Corporation and the United States Sugar Equalization Board, Inc. had been organized in Delaware pursuant to an executive order in the exercise of such power vested in the President by the Food Control Act (40 Stat. 276). The Food Control Act had specifically authorized the President to create and use any agency or agencies in carrying out the functions vested in him.

It must however be noted that on February 12 the Comptroller General in a letter to the Secretary of Agriculture refused to countersign a voucher for a corporation created under a similar authorization. In rendering this opinion the Comptroller relied upon the opinion he had given previously on January 11. This opinion of January 11 was followed by the Attorney General's opinion of February 7 mentioned above which reached an exactly opposite opinion on the exact issue. Since the Comptroller General will review the contemplated expenditures before the Secretary may safely commit himself to turn over funds to any corporation, he should secure a favorable opinion from the Comptroller General supporting such practice.

However, nowhere in the Agricultural Adjustment Act is there found an explicit power to create or designate agencies to carry out the functions of the Secretary except for the limited provision of Section 10, subsections (a) and (b). This lack of explicit authorization does not mean that such authority may not be implied. Late last year the Secretary, in order to aid the removal of surplus agricultural products, employed the Federal Surplus Relief Corporation. The Secretary did this under the provisions of Section 12 (b) which appropriated the proceeds of the processing taxes for, among other things, the removal of surplus agricultural products. Congress has indicated that the use of such a corporate instrumentality was authorized by the terms of the Agricultural Adjustment Act by appropriating \$50,000,000 to enable the Secretary of Agriculture to make advances to the Federal Surplus Relief Corporation. (Public No. 142 - 73d Cong. Section 6). From this it may be implied that the power to create corporations in carrying out the functions vested in the Secretary was proper.

The discretion in the Secretary in the use of funds for the benefit of Puerto Rican agriculture is as broad as that vested in him in the use of funds for the removal of surplus agricultural products. Therefore it is suggested that the Secretary may employ a corporation to carry out the functions vested in him by Section 15 (f), as well as those vested in him by Section 12 (b).

2. The question of whether the Secretary may use a corporate agency having powers in excess of those necessary to the performance of the functions vested in the Secretary is, at least, in the field of doubt. In the above opinion of February 7 rendered by the Attorney General where he was asked whether or not the Public Works Emergency Housing Corporation might have powers in excess of those necessary to carry out a program of public works, he answered that in his belief it would be advisable to limit the powers of the corporation to those necessary to public works.

Though this be not final, it may be said that on other grounds the powers granted by its charter to the Puerto Rico corporation are such that without further restriction it constitutes an improper agency. By the various provisions of its charter the Puerto Rico Company may not only spend its funds and incur debts for the benefit of Puerto Rican agriculture, but for the general welfare of Puerto Rico and the rehabilitation of that territory. This will permit the use of funds derived from the processing taxes for purposes other than those authorized by Section 15 (f) of the Agricultural Adjustment Act. There is a distinction between the use of funds for the benefit of agriculture and the use of funds for the general welfare of the people of Puerto Rico. Section 15 (f) only permits the use of the money for the first purpose. Therefore, if the Secretary were to transfer funds to the corporation it might be used in a manner not authorized.

It would not be a sufficient answer to this argument to say that the corporation would expend the funds granted by the Secretary of Agriculture in such a manner as he might designate and therefore use it for the benefit of agriculture. This is so, because all the assets of a corporation are liable to the claims of creditors and no restriction can be placed by the Board of Directors upon the claims of creditors to those funds. The creditors in question may have derived their rights from business transactions not relating to the benefit of agriculture.

Furthermore, Section 12 of the charter provides that when the corporation be dissolved the money in its treasury may be used in any manner that the Supreme Court of Puerto Rico shall direct to promote the general welfare of the inhabitants of Puerto Rico. Under this provision not only is authority given to a judicial body in determining the use of funds, but the use permitted would be unauthorized by Section 15 (f) of the Act.

Therefore, unless some means, such as a trust agreement, be devised to avoid the above stated difficulties, it is clear that the Puerto Rico Company will be an improper agency in the use of the Puerto Rican processing tax.

3. Assuming that the Secretary may grant funds to a given corporation, no objection would be raised to the use of such corporation, because it was also used by other executive officers or departments of the Government. The fact that such other departments or executive officers are empowered to designate agencies for the performance of the functions vested in them would be sufficient authorization for their use of a corporation also employed by the Secretary of Agriculture. It is believed that the fact that Congress has undertaken to permit Government agencies of one department to be used by another is support for the position that such use will not destroy the agency as an administrative instrument for the functions for which it was originally created. (See 31 U.S.C.A. 686).

Francis M. Shea,
Chief of Brief and Opinion Section.

No. 78

RESTRICTIONS UPON THE IMPORTATION
OF RYE

The Agricultural Adjustment Act confers no authority upon the Secretary to make the importation of rye into the United States conditional upon arrangements for the export and sale abroad of agricultural commodities produced in the United States.

Opinion Section Memorandum No. 115
Dated July 11, 1934.

July 11, 1934.

MEMORANDUM TO MR. CHESTER C. DAVIS, ADMINISTRATOR

This is in reply to your memorandum of July 5, 1934, in which you ask to be advised concerning the possibility of establishing, through licenses under the Agricultural Adjustment Act, a system by which the importation of rye into the United States may be conditioned upon arrangements for balancing such imports with the export of agricultural commodities produced in the United States. Since, in my opinion, the Act confers upon the Secretary no authority to restrict imports in this manner, it is unnecessary to consider your second question in regard to the deposit of the proceeds from rye sales pending the completion of such arrangements. I therefore submit my opinion only upon the following:

QUESTION

May the Secretary, under the Agricultural Adjustment Act, issue licenses to persons engaged in the importation of rye requiring permits for the importation of rye, such permits to be conditioned upon arrangements for the sale and export abroad of agricultural commodities produced in the United States?

OPINION

The Agricultural Adjustment Act confers no authority upon the Secretary to make the importation of rye into the United States conditional upon arrangements for the export and sale abroad of agricultural commodities produced in the United States.

DISCUSSION

(1)

The problem is primarily one of statutory construction and not of constitutional power.

It may be assumed that Congress, had it intended to condition the right to import rye upon the conclusion of satisfactory arrangements with other countries relating to exports, would not lack the constitutional

power to effect such purpose. Under the power to regulate commerce with foreign nations Congress undoubtedly may impose embargoes. Brolan v. U.S., 236 U.S. 216 (1915). It may also admit imports upon such conditions as it may prescribe, and the rights of individual importers and dealers are subordinate to the exercise of this plenary power. These principles are stated in Buttfield v. Stranahan, 182 U.S. 470, 495 (1904) as follows:

"As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution."

In subjecting imports to restrictions, and in authorizing administrative officers to apply such restrictions, Congress may not make a delegation of its legislative power. It may, however, leave to an administrative officer the determination of the time when the exercise of its legislative power shall become effective, and the ministerial details of its application. See Hampton & Co. v. U.S., 276 U.S. 394, 407(1928). But the validity of such delegation of authority is to be tested by the definiteness of the standards to be applied and the confining of administrative authority and discretion within the prescribed standards. Thus, it is stated in Hampton & Co. v. U.S., *supra*, at 409 in considering the flexible provision of the Tariff Act of 1922:

"If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden exercise of legislative power."

See also Field v. Clark, 143 U.S. 649, 683 (1892); Union Bridge Co. v. U.S., 204 U.S. 364, 366 (1907); Buttfield v. Stranahan, *supra*, at 496; Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 214. These citations indicate that when Congress has made an exercise of legislative power and confided to executive officers the duty of applying the provisions of the statute to bring about the desired result, the authority conferred must be confined within standards sufficiently definite to exclude the exercise of arbitrary discretion.

But the question now at issue is not, as in Buttfield v. Stranahan, as to whether Congress is giving the head of an executive department the authority to exclude imports not conforming to certain requirements, has

sufficiently limited the authority to confine it within the sphere of administrative action, but whether Congress has attempted to give to the Secretary of Agriculture the power to exclude imports at all.

(2)

The Agricultural Adjustment Act indicates no intent to authorize the Secretary to impose conditions on imports.

That Congress was not unmindful of the relation of the operation of the Agricultural Adjustment Act to import and export situations is demonstrated by Section 15 (a) making provision for compensating taxes on imports, and by Section 17 (a) providing for the refund of the processing tax upon the exportation of any product with respect to which a tax has been paid. Moreover, the appropriation made available by Section 12 (b) "for the expansion of markets and removal of surplus agricultural products", among other purposes, is not restricted to operations in the domestic market but may embrace the movement of domestic surpluses into the channels of foreign trade. That Congress, in the enactment of this legislation, was fully aware of the bearing of the export trade upon the effectuation of the policy of the Act, is further demonstrated by the declaration in Section 2, paragraph 2, that it is the policy of Congress.

"To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets".

These explicit references and provisions tend to negative the construction of more general language elsewhere in the Act as designed to subject imports to restrictions and conditions not clearly embraced within its terms.

The Act makes no direct provision for conditioning imports upon the conclusion of trade agreements of any character. It is suggested, however, that Section 8 (5), providing for licenses, furnishes authority for submitting imports of rye to a system of permits conditioned upon arrangements for balancing such imports by a corresponding export to the country of shipment of agricultural commodities produced in the United States. Section 8 (3) authorizes the Secretary

"to issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of

interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof."

Undoubtedly, importers of rye as persons engaged in the handling of an agricultural commodity in the current of interstate or foreign commerce are subject to licensing under this section and may be restricted in the conduct of their business in the ways in which persons engaged in domestic commerce are restricted. There is nothing in the language of the Act, however, to support a construction that as dealers in imported commodities they may be subjected to regulations different in character from those imposed upon dealers in commodities domestically produced. Under the broadest construction which may be given the licensing power it is at least confined to regulating the conduct of the licensees' business ⁱⁿ ways necessary to effectuate the declared policy of the Act. The proposed scheme is not confined to such regulations but is a bargaining device to be used in negotiating favorable trade arrangements with foreign countries. As such it does not merely propose to fix standards in conformity to which the licensees' business must be conducted. The scheme contemplates at least the possibility of prohibiting the licensees from carrying on their business, except in the event of favorable trade arrangements, the effectuation of which they will probably be wholly incapable of controlling. It is difficult to square the general scheme of the Agricultural Adjustment Act with an interpretation of Section 8 (3) which would authorize the Secretary of Agriculture to throw in licensees under that section as pawns in negotiations for foreign trade arrangements. It may be that such restrictions as those contemplated would tend to effectuate the policy of the Act by removing agricultural surpluses but the Act does not purport to confer upon the Secretary all powers the exercise of which might be helpful in effectuating the declared policy. On the contrary, it confers upon the Secretary certain enumerated powers to be used to that end. The licensing power is one of the enumerated powers. The legislative history indicates that it is intended to be confined to the regulation of marketing by the licensees.

Thus, the Report of the House Committee on Agriculture describes the licensing power in the following terms:

"As a supplementary power to aid in effectuating the declared policy and in making effective the control measures taken under the bill, the Secretary of Agriculture is

authorized to license processors, associations, producers, and other agencies engaged in the handling in interstate or foreign commerce of basic agricultural commodities or products thereof, or any agricultural commodity or product that is competitive therewith in domestic or foreign markets No licenses are required unless the Secretary of Agriculture first determines that there exists necessity for the exercise of the licensing provisions with respect to the marketing agencies or any portion thereof engaged in handling a particular commodity and has pursuant thereto put the licensing provisions into effect. The licenses are conditioned upon the observations of such terms as the Secretary may incorporate in the licenses as being necessary to eliminate unfair practices or charges that prevent or tend to prevent, the effectuation of the declared policy and the restoration of normal economic conditions in the marketing, or financing thereof, of the commodity or its products."

The wording of this report indicates even more clearly than the language of the Act itself that the licensing feature is designed for use, when necessary, to control marketing agencies as such, and in respect to the particular commodity which any such agency is engaged in handling. The legislative history discloses also that the wording of Section 8 (3) was carefully harmonized with the wording of 8 (2) which provides for marketing or domestic trade agreements and without reference to possible foreign trade agreements, 77 Cong. Rec. pp. 3103, 3122, 3175.

In conclusion on this point, it may be stated that neither the language of the paragraph providing for licensing, nor the general scheme of powers to be exercised by the Secretary, nor the legislative history indicates an intent to confer authority to ban imports, conditionally or otherwise, or to provide a means of securing trade agreements with foreign governments or with dealers in foreign countries. This failure of specific authorization, coupled with the complete absence of any indication that the language of the statute was intended to embrace the authority contended for, is sufficient to call for a negative conclusion upon the question submitted. Such a conclusion is only fortified by the constitutional doubts which would attend the delegation of authority to ban imports, except in accord with standards sufficiently definite to confine the exercise of the authority clearly within the scope of administrative action.

(3)

The particularity with which Congress has provided for the regulation of imports precludes the possibility of construing the

general language of the Agricultural Adjustment Act as conferring authority for such purpose.

In the exercise of its power to collect duties and imports and to regulate commerce, Congress has imposed upon imports various burdens and restrictions, which have been set forth with great particularity in such legislation as the Tariff Act of 1930. It has also at various times conferred upon administrative officers authority, upon certain conditions, to vary these burdens or to prohibit altogether the importation of deleterious or inferior goods, as in the flexible provision of the Tariff Act or in the Act involved in Buttfield v. Stranahan, *supra*, prohibiting the importing of tea falling below standards to be fixed by the Secretary of the Treasury. The specific wording of such statutes in making a delegation of authority for the precise purpose sought to be accomplished, and the careful prescription of the method to be pursued by the administrative officers in each case, are indicative of the particularity with which Congress has exercised its powers in this field, and have been a factor in court decisions upholding the delegation.

Even in the present economic emergency, Congress has not failed to deal with great particularity with problems relating to import restrictions.

As has been pointed out, the Agricultural Adjustment Act, as originally enacted, contained provisions relating to imports and exports at points where the operation of the Act would necessitate adjustments with respect thereto. By the Act commonly known as the Costigan-Jones or "Sugar Act" (Pub. No. 213 - 73d Cong.) authority is specifically conferred upon the Secretary to forbid processors and others from importing sugar in excess of quotas to be fixed by the Secretary on the basis of previous importation and current consumption requirements. The purpose of these provisions, equally with the provision of Section 8 (3) of the Act for the issuance of licenses, is to effectuate the declared policy of the Act, but the power conferred furnishes an additional and specific means of accomplishing, with respect to one commodity, adjustments of supply and demand consistent with the general policy of the Act.

Moreover, the Agricultural Adjustment Act is only one statute of many passed to provide the means of economic recovery and adjustment. Particularly, it is related to the National Industrial Recovery Act as part of a common program. In Section 3 (e) of that Act provision is made for dealing with imports where they interfere with the operation of a code of fair competition and an elaborate procedure is required and a limited form of regulation only is permitted.

Here the President may not act alone, as he does in ordinary code matters, but must refer the matter to the United States Tariff Commission. This commission has been invested by its organic act with jurisdiction in matters of foreign trade. The procedure of

Section 3 (e) leaves the manner of controlling foreign imports where it was in normal times, freed from the more summary procedure in other parts of the National Industrial Recovery Act. In the face of this, it is unbelievable that Congress intended to have the Secretary exercise virtual embargo powers under Section 8 (3) of the Agricultural Adjustment Act without specific authorization and without reference to the traditional procedure governing regulations of imports. In the absence of specific authorization in the Agricultural Adjustment Act it is important to consider in implying any such authority that the Secretary is an administrator, not normally having any control over imports, and that, in the case of licenses, no provision for hearing is given.

In the recent amendment to the Tariff Act approved June 12, 1934 (Pub. No. 316 - 73d Cong.) giving the President authority to enter into foreign trade agreements, Congress has made specific and comprehensive provision for the restriction of imports as an incident of arrangements to promote the export trade. The power to enter into such agreements is conferred upon the President

"For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States"

The authority conferred upon the President includes authority:

"To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder." Section 350 (a) (2)

It thus appears that authority to enter into trade agreements is exclusively vested in the President and is accompanied by authority to vary existing import restrictions to the extent necessary to make such agreements effective. It is to be observed, however, that the President is not authorized to make the importation of any commodity

conditional upon the conclusion of such a trade agreement. The proposal which is the subject of this memorandum would read into the Agricultural Adjustment Act an authority, delegated to the Secretary of Agriculture, through a combination of licenses and permits-to-import to make the importation of "any agricultural commodity or product, or any competing commodity or product thereof," subject to precisely such condition. It is not reasonable in the absence of compelling language in the statute, to conclude that Congress contemplated such disparity of treatment with respect to these and other commodities and products with respect to the negotiation of foreign trade agreements, or that it intended, in this one respect, to divide administrative authority with respect to securing such arrangements between the President and the Secretary of Agriculture.

Moreover, the Act authorizing the President to enter into trade agreements itself illustrates the traditional care with which Congress, when providing for the participation of executive agencies in matters having to do with imports, specifies the precise occasion and nature of such participation. Thus Section 4 provides that

"before concluding such agreement the President shall seek information and advice with respect thereto from the United States Tariff Commission, the Departments of State, Agriculture, and Commerce and from such other sources as he may deem appropriate."

Section 4 of the same Act also provides for public notice of an intention to negotiate a foreign trade agreement and for an opportunity to interested persons to present their views. It thus shows the same regard for the interests of parties affected by import restrictions as is shown in Section 3(e) of the National Industrial Recovery Act in providing for investigation and hearing before directing that articles shall be permitted entry only upon particular terms and conditions. As has been pointed out, such provision is totally lacking in the licensing provision of the Agricultural Adjustment Act.

In conclusion, it is my opinion that the language of Section 8 (3) of the Agricultural Adjustment Act is inappropriate to confer upon the Secretary authority, through licenses, to require permits for the importation of rye conditioned upon arrangements for the export of other commodities to the countries from which imported. Such authority, in the absence of a fairly definite prescription of the standard to be followed in its exercise, would be open to constitutional objections. An interpretation of the Agricultural Adjustment Act as conferring such authority is negated by this possible constitutional defect and, by implication, it is further negated by its inconsistency with the authority which Congress has specifically conferred by other legislation for the control of imports during the emergency period, and particularly by the authority conferred upon the President to enter into foreign trade agreements.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 79

USE OF FUNDS FOR LAND POLICY SECTION

Funds appropriated under Section 12(a) and 12(b) of the Agricultural Adjustment Act may be used to pay the administrative expenses of the Land Policy Section of the Agricultural Adjustment Administration only in so far as that Section is engaged in performing, or assisting in the performance of, functions authorized by the Agricultural Adjustment Act.

Opinion Section Memorandum No. 116
Dated July 11, 1934.

July 11, 1934.

MEMORANDUM TO MR. WARD M. BUCKLES,
DIRECTOR OF FINANCE

In reply to your memorandum to Mr. Frank, dated June 26, 1934, which has been referred to me, I submit my opinion upon the following:

QUESTION

May the sum of \$100,000,000 appropriated under Section 12 (a) of the Agricultural Adjustment Act or the proceeds derived from all taxes imposed under the Act, and appropriated under Section 12 (b), be used to pay the administrative expenses of the Land Policy Section of the Agricultural Adjustment Administration?

OPINION

Such funds may be used to pay the administrative expenses of the Land Policy Section only in so far as that Section is engaged in performing, or assisting in the performance of, functions authorized by the Agricultural Adjustment Act.

DISCUSSION

Section 12 (a) of the Agricultural Adjustment Act appropriates the sum of \$100,000,000 to be available to the Secretary of Agriculture "for administrative expenses under this title" and for rental and benefit payments. The proceeds of processing taxes are made available to the Secretary for expansion of markets, removal of surplus agricultural products, rental and benefit payments, refunds on taxes, and "administrative expenses" in so far as such administrative expenses relate to part 2 of the Agricultural Adjustment Act. It is sufficiently obvious from the wording of these clauses that the funds in question are only available for the payment of such administrative expenses as, in the case of the sum of \$100,000,000, are related to functions authorized by the Agricultural Adjustment Act, and, in the case of processing taxes, are related to purposes under part 2 of the Agricultural Adjustment Act.

Information received from Dr. L. C. Gray, Chief of the Land Policy Section, is to the effect that his section has "among many other functions, the duty of planning and managing the purchase and leasing of sub-marginal lands to be taken out of cultivation, the formulation of plans for the readjustment in size of agricultural

holdings and in farm ownership, so that the farms will fit into the general agricultural requirements of the particular locality, and the formulation of permanent plans for surplus removal and for a general readjustment of agriculture." It also appears that the Land Policy Section "serves as a liaison agency between the Department of Agriculture and other Government agencies handling such matters as soil erosion, plant purchases, and other matters of great importance to agriculture and to the agricultural adjustment program", and that the section cooperates with the National Planning Board, and serves as a coordinating agency within the Department with respect to land acquisition, land administration, and land planning.

The mere fact that the functions of the Land Policy Section assist, directly or indirectly, the purposes of the Agricultural Adjustment Administration is not alone sufficient to justify payment of its expenses of the funds in question, for, as has been indicated, the expenses must relate to functions authorized by the Agricultural Adjustment Act. In the absence of a detailed statement of the exact functions of the Section, it is impossible at this time to advise you finally with respect to any particular functions of the Section. It may be suggested that the purchase and leasing of sub-marginal lands, while indirectly resulting in the reduction of agricultural surpluses, is possibly not within the scope of the phrase "removal of surplus agricultural products", as the phraseology of this clause suggests the actual purchase and disposition of crop surpluses rather than their prevention by the purchase of sub-marginal lands. On the other hand "the formulation of permanent plans for surplus removal" suggests that the Section is acquiring information and mapping out programs which will assist in the function of removing surplus agricultural products, which is a function authorized by the Agricultural Adjustment Act. Administrative expenses for work of this kind may properly be paid out of the funds in question.

I suggest that, if you desire an opinion upon the question whether any particular administrative expenses of the Land Policy Section are payable out of funds appropriated under Section 12, that your request be accompanied by precise statements of the administrative operations, and the purpose of such operations, and by a memorandum showing that such expenses were incurred in the performance of functions authorized by the Agricultural Adjustment Act.

Francis M. Shea,
Chief of Brief and Opinion Section,
Office of the General Counsel.

No. 80

EMERGENCY APPROPRIATION ACT EXPENDITURES
FOR FLOOD RELIEF

Under the Emergency Appropriation Act, Fiscal Year 1935, appropriating funds "for relief in stricken agricultural areas," funds appropriated are not limited to use for drought relief but may be used also for flood relief purposes.

(A similar opinion under date of July 11, 1934, (Opinion Section Memorandum #121) is used to support the conclusion that expenditures may be made from such funds for the purpose of moving live stock out of certain flood areas.)

Opinion Section Memorandum No. 120
Dated July 11, 1934.

July 11, 1934.

MEMORANDUM TO MR. CHESTER C. DAVIS

Your memorandum to Mr. Jerome N. Frank, dated July 9, 1934, requesting an opinion, has been referred to me, and in accordance therewith, I submit the following:

QUESTION

Can money be expended for flood relief purposes under the "Emergency Appropriation Act, fiscal year 1935" which appropriates funds "for relief in stricken agricultural areas", or are these funds to be employed only for drought relief?

OPINION

Expenditures for flood relief purposes are appropriate under the Act.

DISCUSSION

I.

The Wording of the Act Makes it Clear That Expenditures For Flood Relief are Appropriate.

The pertinent part of the "Emergency Appropriation Act, fiscal year 1935", herein involved, is as follows:

"Emergency Relief

To meet the emergency and necessity for relief in stricken agricultural areas, to remain available until June 30, 1935, \$525,000,000, to be allocated by the President to supplement the appropriations heretofore made for emergency purposes and, in addition thereto, for (1) making loans to farmers for, and/or (2) the purchase, sale, gift, or other disposition of seed, feed, freight, summer fallowing and similar purposes;"

Thus, there nowhere appears a strict limitation of the appropriation to drought relief purposes. The appropriation, rather, is "for relief in stricken agricultural areas". It is obvious that an "agricultural area" may be "stricken" by flood so as to require "emergency relief" as greatly as areas "stricken" by drought.

Furthermore, the appropriation is made "to supplement the appropriations heretofore made for emergency purposes." The "appropriations heretofore made" seem to be those made by certain Acts mentioned in the paragraph directly preceding the paragraph herein under consideration, - among them, the Federal Emergency Relief Act of 1933. It thus seems that certain "appropriations heretofore made for emergency purposes" are supplemented by the appropriation in this Act for the purposes of such other legislation, such as the Federal Emergency Relief Act of 1933. Because this appropriation can also be employed "to supplement" the appropriations for other than drought relief Acts, it would indicate that a limitation to drought relief purposes was clearly not contemplated. And the Federal Emergency Relief Act of 1933 (48 Stat. 53), - one of the Acts for which an appropriation had already been made "for emergency purposes", - makes the broadest kind of provision for relief expenditures. It provides that funds shall be made available for "relief and work relief". Sect. 4 (a). And it further provides that "the decision of the Administrator as to the purpose of any expenditure shall be final." Sect. 4(c). It seems clear, therefore, that the Act in question, in making its appropriation also available for such wide purposes, cannot reasonably be construed to limit its funds for purely drought relief purposes.

Still further, however, "in addition" to the supplementing of these other appropriations made for emergency purposes, this Act authorizes such broad activity as making loans or gifts to farmers for seed, feed, and freight purposes, and then broadly permits such activity for "similar purposes". Such a blanket authorization of employment of the appropriated funds would seem to indicate an intention to have the funds available for broad, rather than restricted purposes.

If the appropriation "for relief in stricken agricultural areas" was meant to be limited only to drought relief, it would have been easy for Congress to have so stated. It is true that it is clear from the text of the Act itself that the drought was a major consideration in appropriating these funds. For the very next paragraph specifically refers to the drought, stating:

"If, during the present drought emergency, a carrier subject to the Interstate Commerce Act shall, at the request of any agent of the United States, authorized so to do, establish special rates for the benefit of drought sufferers such a carrier shall not be deemed to have violated the Interstate Commerce Act with reference to undue preference or un-

just discrimination by reason of the fact that it applies such special rates only to those designated as drought sufferers by the authorized agents of the United States or of any State." (underscoring supplied)

But the fact that the Act fails to restrict the appropriation to drought relief, when in closely related sections of the Act the drought is specifically considered, is significant.

A compelling reason for concluding that relief for flood purposes is not beyond the scope of the Act is that, as is the case with drought, floods present farmers with livestock and feed problems. As a matter of fact, the specific kind of relief involved here is "relief in connection with livestock and feed." As the President stated in his message pertaining to drought relief, "Assistance by the Federal Government is necessary to move feed to livestock and livestock to feed." Exactly the same problem is present in areas stricken by flood. And the Act specifically provides for relief in connection with "feed". The "similar purposes" provided for in the Act would undoubtedly include livestock relief. Furthermore, an Executive Order dated June 23, 1934, allocating funds to various agencies pursuant to the provisions of the Act, specifically allocates certain funds to the Secretary of Agriculture "for the purchase, sale, gift or other disposition of seed, feed, and livestock and for transportation thereof."

There is thus nothing in the wording of the Act to indicate that the appropriation is made strictly for drought relief purposes. On the other hand, the broad purposes and terms employed therein indicate that the appropriation can properly be employed for relief in agricultural areas, no matter how "stricken".

II.

There is Nothing in the Legislative History of the Act to Compel a Contrary Conclusion.

The failure of the Act to specifically limit the appropriation to "drought" relief purposes, and the plain meaning to be derived from the use of the phrase "stricken agricultural areas" makes unnecessary an inquiry into the legislative intent. For such an investigation is only appropriate where, for some reason, the wording of the Act is ambiguous. As the court stated in United States v. Goldenberg, 168 U.S.95 (1897):

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words * * *." (p. 102)

Or as Justice Day stated in United States v. Standard Brewery, 251 U. S. 210 (1920):

"Nothing is better settled than that in a construction of a law its meaning first must be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written," (p. 217).

But it should be noted at least that there is nothing in the legislative history of the Act which compels a conclusion contrary to the clear meaning of the words Congress employed therein.

It is true that the history of this particular appropriation, and the debates thereon, indicate that Congress primarily had drought relief in mind in providing for this legislation.

Originally, as the Bill was reported in the House, there was no such special appropriation of \$525,000,000 "for relief in stricken agricultural areas" (Report House Committee on Appropriations, 73d Congress, Second Session, No. 1879, June 2, 1934). It was contemplated that the President could draw on unobligated balances of the Reconstruction Finance Corporation for expenditures for drought purposes. (Congressional Record June 4, 1934, pp. 10753-7). The provision first appeared in the Senate Report of the Committee on Appropriations under the label "Drought relief" (Report Senate Committee on Appropriations, 73d Congress, 2d Session, No. 1418, p. 4, June 6, 1934). An amendment was then made appropriating \$450,000,000, but the broad phrase "for relief of persons in stricken agricultural areas" was employed. On June 9, however, President Roosevelt sent a message to both houses of Congress asking for \$525,000,000 for drought relief purposes, the President stating that this figure had been arrived at "after a conference with members of Congress from the affected regions" (Congressional Record, June 9, 1934, pp. 11305, 11315). The tentative manner in which the \$525,000,000 was to be expended was also set out in the Presidential message. A new amendment was then drafted containing the additional sums the President requested, and specifying some of the broad purposes set out in his message (See Conference Report No. 2057, House of Representatives, 73d Congress, 2d Session, June 15, 1934). But this amendment still retained the phrase "for relief in stricken agricultural areas". All during the Senate debate on this amendment, it was the drought that was referred to (Congressional Record, June 15, 1934, pp. 11980-11986). At one stage of the debate, Senator Adams stated that the appropriation was inappropriate Federal activity because he had once asked Congress for an appropriation for flood relief in his State and his request was denied (See Congressional Record, June 15, 1934, p. 11985). So that it is clear that the drought was foremost in the minds of Congress when they appropriated this money.

But because the impelling motive for appropriating these funds for the relief of "stricken agricultural areas" was undoubtedly the

drought, and because the appropriation was made primarily as a result of a Presidential message pertaining to the drought, it is not therefore necessarily to be concluded that the funds were to be so earmarked. There is nothing in the debates which specifically indicates that the funds cannot be used for purposes other than drought relief. Nor does any such intention to make such a strict limitation appear either in the conference reports or the committee reports. And, as a matter of fact, Representative Taber specifically noted that statements were being made by Congressmen that the \$525,000,000 "is for relief in the drought areas". But he pointed out to the House that

"It is not specified that way exactly in the Bill. It calls for relief in the stricken agricultural areas." (Congressional Record, June 16, 1934, p. 12369).

CONCLUSION

It seems clear from the broad wording and provisions of the Act that agricultural areas stricken in ways other than by drought may properly be the recipients of the relief funds appropriated by the Act in question, and that there is nothing in the legislative history of the Act which compels a different conclusion.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 81

OPERATION OF THE PUERTO RICO COMPANY

In view of the doubt which may exist as to whether or not the Secretary can direct that the proceeds of processing taxes be used to repay loans, an opinion of the Comptroller General should be obtained before a scheme involving such use of the proceeds is proceeded with.

Assuming that the Puerto Rico Company can properly act as an agent for the Secretary the Secretary can nevertheless in no way bind himself to turn over to the Puerto Rico Company future processing tax receipts.

In the proposed charter of the Puerto Rico Company the powers enumerated are extensive enough to carry out the purposes of Section 15(f) of the Agricultural Adjustment Act.

Opinion Section Memorandum No. 118
Dated July 12, 1934.

July 12, 1934

MEMORANDUM TO MR. WENCHEL

On July 11 you asked the following questions:

(1) May the Secretary, with the approval of the President, direct that the proceeds of processing taxes held in a separate fund in the name of Puerto Rico under Section 15 (f) of the Agricultural Adjustment Act, be turned over to "The Puerto Rico Company" to be used to repay loans theretofore made to said company, the proceeds of which were expended for the benefit of agriculture?

(2) It is contemplated that The Puerto Rico Company, as agent of the Secretary, will anticipate receipts out of the proceeds of the processing tax on sugar and will expend such monies for the benefit of agriculture. The company will anticipate such receipts by pledging the amount, which the Secretary is firmly bound to turn over to the company for a loan or loans of money to the corporation, to be expended, and actually expended, by it for the benefit of agriculture in Puerto Rico.

(3) Does the proposed charter of The Puerto Rico Company (heretofore submitted to you) contain the powers necessary to permit the company to expend, for the purposes of Section 15 (f) of the Act, monies turned over to it by the Secretary of Agriculture for those purposes?

OPINION

The present opinion is given upon the assumption that The Puerto Rico Company can properly act as an agent for the Secretary in the carrying out of these plans. In a previous memorandum submitted to you the obstacles in the way of using the present proposed company have been set out and no further consideration will be given to them here.

(1) In view of the fact that there may be considerable dispute as to whether or not the Secretary can direct that the proceeds of processing taxes be used to repay loans, an opinion of the Comptroller General would seem to be called for before the scheme can proceed safely. Furthermore, the weight of argument for either position will change with the

factors of the plan and, therefore in the absence of more facts, hypothetical situations will have to be considered in the giving of an opinion.

(2) Though the Secretary might say that his future policy contemplates the turning over of the future processing tax receipts to The Puerto Rico Company, he can in no way bind himself to exercise his discretion in this manner in the future. In other words, no enforceable legal obligation would arise to bind the Secretary to fulfill his presently stated policy, and there would seem, therefore, to be nothing for The Puerto Rico Company to pledge.

(3) In the previous memorandum referred to above the effect of the powers granted to The Puerto Rico Company upon its availability as an agent for the Secretary has been discussed. The position taken in that memorandum was that the powers are too broad. The Charter powers are clearly extensive enough to carry out the purposes of Section 15 (f) of the Act.

DISCUSSION

(1) Section 15 (e) grants the Secretary of Agriculture the power to direct, with the approval of the President, the processing tax receipts to be used for the benefit of Puerto Rican agriculture. The Secretary is given no power to borrow money to carry out this scheme. It is these two propositions which serve as standards in debating the question of the propriety of using such processing tax receipts to pay off loans.

It seems clear that if the Secretary were to take these tax receipts and pay them out for debts already incurred in benefiting agriculture in Puerto Rico, this would be an improper use. The money must be used presently for the benefit of agriculture. The fact that other funds have been used for the benefit of agriculture and that the Secretary is paying off the debts incurred in raising such funds will not constitute the use of the Secretary's funds for the benefit of agriculture but only for the payment of debts.

However, it may be that in view of other factors, this analysis may not be conclusive. It will be assumed that the purchase of lands proposed by this scheme is for the benefit of agriculture. Therefore, it would seem that if the Secretary were to purchase lands upon an installment plan and were to use the future receipts as they came in, in paying these installments, that such future receipts would be used for the benefit of agriculture.

Therefore, it also might be argued that if instead of employing the installment plan the Secretary were to buy land and subject it to mortgages and undertook to pay off these mortgages, he would be steadily acquiring greater and greater interest in this land in pursuance of the original scheme.

Furthermore, since the mortgages are likely to be foreclosed unless the obligations which they cover are met, the payment of these mortgages would be required to avoid destruction of the entire scheme which is dependent upon the ownership of the lands.

The second proposition stated at the beginning of this discussion, namely, that the Secretary is not empowered to borrow money offers an answer to these last arguments. Since the Secretary is not empowered to borrow money may he use the device of having The Puerto Rico Company borrow money to avoid this prohibition? The fact that his purchase plan would require the paying off of the debts of the corporation to save the scheme would not change the relevance of this question, but only lead to another one. Is not the whole plan whereby the Secretary jeopardizes the scheme by borrowing money improper because of his lack of power and can the fact that he has placed himself in such a position permit him in the future to use this position as an excuse for spending money in saving the plan?

The fact that the questions stated above may be raised and that reasonable men may disagree as to their answers makes an opinion by the Comptroller General imperative.

(2) If the Secretary were to obligate himself to pay over the tax receipts received in the future to The Puerto Rico Company, he would not be pledging property which he had, but only pledging his exercise of discretion in the future. It is illegal for a Government official vested with authority for the public good, to pledge or bind himself in any way or limit the powers granted him.

Cases in support of this proposition will be found in Edwards v. City of Goldsboro, 53 S.E. 652 (N.C. 1906); Martin v. Mayor, 1 Hill (N.Y.) 546; Fuller v. Dance, 35 Mass. 472. In the first case, the court had before it an agreement between a municipality and private individuals by which, in return for a sum of money paid to the municipality by these individuals, it undertook to locate certain public buildings near their property. The power to construct such public buildings had been granted the municipality by the General Assembly of the State, and the municipality had been invested with the discretion in the choice of location. The court said on page 653:

"We take it that any contract by which it should be attempted to prevent the city authorities from deciding impartially on a matter effecting the general welfare would be unenforceable. If public trustees or officers may, by contract, divest them-

selves of any portion of the essential powers intrusted to them, they may just as well alienate all of them, though by degrees, and thus eventually abdicate the exercise of every governmental function. Such agreements are, therefore, contrary to the true principles upon which society is founded and subversive of all well-regulated government."

(3) It is difficult to elaborate on the opinion rendered in answer to the third question. A reading of the charter of The Puerto Rico Company has failed to reveal any want of power to carry out any of the purposes specified in Section 15 (f).

Francis M. Shea,
Chief of Brief and Opinion Section,
Office of the General Counsel.

No. 82

AUTOMOBILE TRANSPORTATION AND AUTOMOBILE PURCHASE

Funds allocated under the Emergency Appropriation Act, Fiscal Year 1935, may not be used for the purchase of passenger automobiles to be used in connection with the purchase of seeds, at least in the absence of express direction by the President.

Employees of the Department of Agriculture while on travel status may hire passenger automobiles for special trips to reach points inaccessible by common carrier, and may contract to pay for such transportation by trip, mile, hour, or day.

Under certain circumstances, employees may be reimbursed for expenses incurred in the use of their own automobiles while traveling on official business.

Contracts may be made with persons, not employees of the Department of Agriculture, for specific services in connection with the sampling, inspection, and purchase of seeds.

Although funds allocated under the Emergency Appropriation Act for the purchase of seeds may not be used for the purchase of automobiles primarily designed for carrying passengers, they may be used for the purchase of trucks, and the use of such trucks for carrying passengers is not prohibited by 38 Stat. 508 (5 U.S.C.A., Sec. 78).

(Opinions also have been given to the effect that (1) funds allocated to the Bureau of Animal Industry from the appropriation to enable the Secretary of Agriculture to carry out the purposes of the Jones-Connally (Cattle) Act are not available for the purchase of passenger automobiles, and (2) that funds appropriated by the Agricultural Adjustment Act are available for the purchase of light delivery trucks. Opinion Section Memoranda Numbers 126 and 130)

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July 13, 1934.

MEMORANDUM TO MR. PHILIP G. MURPHY, CHIEF,
COMMODITIES PURCHASE SECTION

In reply to your memorandum of July 7, I submit my opinion upon the following:

QUESTIONS

- (1) When automobile transportation is necessary in connection with the purchase of seeds with funds allocated under the Emergency Appropriation Act, fiscal year 1935, may automobiles be purchased, with or without the formality of public bidding?
- (2) If such purchase is not authorized, what arrangements can legally be made for necessary automobile transportation?

OPINION

- (1) Such funds may not be used for the purchase of passenger automobiles, at least in the absence of express direction by the President.
- (2) Employees of the Bureau of Agriculture while on travel status may hire passenger automobiles for special trips to reach points inaccessible by common carrier, and may contract to pay for such transportation by trip, mile, hour, or day.
- (3) Under certain circumstances, employees may be reimbursed for expenses incurred in the use of their own automobiles while traveling on official business.
- (4) Contracts may be made with persons, not employees of the Department of Agriculture, for specific services in connection with the sampling, inspection, and purchase of seeds.

(1)

Such funds may not be used for the
purchase of passenger automobiles.
at least in the absence of express
direction by the President.

The Act of July 16, 1914, 38 Stat. 454, at 508, Sec. 5 (5 U.S.C.A., Section 78) provides that no expenditure can be made from any appropriation for the purchase of any passenger-carrying vehicle unless specifically authorized by law. It reads as follows:

"No appropriation made in any Act shall be available for the purchase of any motor-propelled or horse-drawn passenger-carrying vehicle for the service of any of the executive departments or other Government establishments, or any branch of the Government service, unless specific authority is given therefor. There shall not be expended out of any appropriation made by Congress any sum for purchase, maintenance, repair, or operation of motor-propelled or horse-drawn passenger-carrying vehicles for any branch of the public service of the United States unless the same is specifically authorized by law. In the estimates for each fiscal year there shall be submitted in detail estimates for such necessary appropriations as are intended to be used for purchase, maintenance, repair, or operation of all motor-propelled or horse-drawn passenger-carrying vehicles, specifying the sums required, the public purposes for which said vehicles are intended, and the officials or employees by whom the same are to be used."

The terms of this statute, covering as it does all appropriations made by Congress for any branch of the public service, are comprehensive, and must bar the purchase of automobiles with funds appropriated by the Emergency Appropriation Act, unless Congress has acted to except such funds from the prohibitions of the statute.

The Emergency Appropriation Act, fiscal year 1935, appropriates \$525,000,000 "to be allocated by the President to supplement the appropriations heretofore made for emergency purposes and in addition thereto for (1) making loans to farmers for, and/or (2) the purchase, sale, gift, or other disposition of seed, feed, freight, summer fallowing and similar purposes." The particular funds now in question represent an allocation to the Secretary "for the purchase, sale, gift, or other disposition of seed, feed, and livestock, and for transportation thereof," this allocation having been made by Executive Order No. 6747, dated June 23, 1934. The purchase of passenger automobiles is clearly not within the enumerated purposes for which these funds have been made available.

The Act further provides that

"....expenditures hereunder and the manner in which they shall be incurred, allowed, and paid, shall be determined by the President, and may include expenditures for personal services and rent in the District of Columbia and elsewhere and for printing and binding and may be made without regard to provisions of section 3709 of the Revised Statutes."

It is apparent that the expenditures here provided for must include the necessary means of accomplishing the designated purpose, unless such means are otherwise provided, and Congress has acted to remove the

means which may be employed from certain restrictions which ordinarily govern the expenditure of public funds. Thus it is provided that the expenditures "may include expenditures for personal services and rent in the District of Columbia," thereby lifting the restriction contained in 40 U.S.C.A. Section 34, and also "for printing and binding," thereby lifting the restriction contained in 31 U.S.C.A., Section 588. It is further provided that expenditures may be made without regard to the provisions of Section 3709 of the Revised Statutes (41 U.S.C.A., Section 5) which is the statute requiring public bidding for government purchases. These express exemptions negative any inference that Congress by other and merely general language intended to permit other forms of expenditure specifically prohibited by statute.

The mere fact that the appropriation is to be used for purposes of an emergency nature, and that there may be urgent need for the purchase of automobiles in carrying out the duties imposed, does not serve to modify or repeal the prohibition contained in 38 Stat. 508. This was the conclusion of the Comptroller General in passing upon a proposal for the purchase of cars from the allotment of National Industrial Recovery Act funds for the expense of oil regulation. 13 C.G. 236 (Feb. 20, 1934). The Comptroller said:

"While the appropriation was made in broad terms for the purpose of carrying into effect the provisions of the National Industrial Recovery Act and for each and every object thereof, to be expended in the discretion and under the direction of the President, it is not to be assumed it was intended to be used for expenditures specifically prohibited by law.

"The Act of July 16, 1914, supra, vests no discretion in either administrative or accounting officers and, necessarily, must be given effect even though it may not be considered conducive to the best results."

Subsequent to this decision of the Comptroller, the President, by Executive Order No. 6660, dated March 27, 1934, authorized:

"the heads of all emergency agencies established under the authority of the said National Industrial Recovery Act and operating under funds allocated to them by the President from the appropriation for national industrial recovery contained in the said Fourth Deficiency Act, together with the heads of all executive departments and other independent establishments insofar as they operate under funds so allocated * * * to make such expenditures * * * as they may deem necessary to effectuate the purposes for which the said funds are allocated...."

In this order the purchase and maintenance of motor-propelled passenger-carrying vehicles was expressly authorized. The Comptroller General has passed upon the effect of this Executive Order in respect to a subsequent proposal for the purchase of a passenger-carrying automobile by the Federal Alcohol Control Administration. Decision of June 23, 1934 - A-56143. He thus advised the Director of that Administration:

"Executive Order No. 6660 of March 27, 1934, authorizes emergency agencies operating from funds allocated from the appropriation made by the Fourth Deficiency Act of June 16, 1933, for the purposes of the National Industrial Recovery Act of that date, to utilize such funds for the purchase, operation and maintenance of passenger-carrying vehicles notwithstanding the prohibition contained in the act of July 16, 1914, supra, when deemed necessary by the head of the particular agency to effectuate the purposes for which said funds were allocated. Accordingly, if you now specifically determine that purchase of the vehicle in question is necessary to 'effectuate the purposes' for which the moneys were allocated to your Administration and such determination is filed in this office with the vouchers making payment, objection to such purchase by this office will be unnecessary if made subject to the statutory limitation as to price and the requirements of Section 3709, Revised Statutes, with respect to advertising, etc."

Executive Order No. 6660 does not, of course, authorize the purchase of automobiles with the funds now in question because they are not allocated from the appropriation for national industrial recovery made in the Fourth Deficiency Act. The question arises, however, whether the purchase of automobiles from funds allocated from the appropriation made for relief purposes by the Emergency Appropriation Act, fiscal year 1935, may not be authorized by an Executive Order issued for such purpose.

The Deficiency Appropriation Act of June 16, 1933, provides that the appropriation made "for the purpose of carrying into effect the provisions" of the National Industrial Recovery Act and the Act of March 31, 1933, for the relief of unemployment shall "be expended in the discretion and under the direction of the President." No specific provision is made for relieving such expenditure from the restriction of statutes specifically prohibiting expenditures for the purchase of automobiles, etc., except that, as to the amount made available to the Tennessee Valley Authority, expenditures for automobiles and numerous other purposes are enumerated and authorized.

The language conferring authority on the President to determine expenditures for emergency relief under the Emergency Appropriation Act, fiscal year 1935, is not less broad. It reads:

"Expenditures hereunder and the manner in which they shall be incurred, allowed, and paid shall be determined by the President."

In the absence of express directions by the President, the Secretary, in making expenditures from the amounts allotted to him, cannot be regarded as authorized to make expenditures for purposes expressly prohibited by a general statute unless such purposes are within the express exceptions made by the Emergency Appropriation Act itself. The authority given to the President, however, to determine "expenditures hereunder," is complete. The express provision for certain expenditures otherwise prohibited would seem not to imply a limitation on the exercise of the authority of the President to direct whatever expenditures he may determine to be needful, but only to imply a limitation upon the administrative officers to whom the funds are allocated to make expenditure for any purpose generally prohibited, and not excepted by the Act, in the absence of such direction by the President.

There are, however, ways by which necessary arrangements can be made for automobile passenger transportation which would appear adequate for the present occasion, which require no express authorization by the President and which are not subject to the doubts which attend the correct construction of the provisions of the Emergency Appropriation Act.

(2)

Employees of the Bureau of Agriculture while in a travel status may hire passenger automobiles for special trips to reach points inaccessible by common carrier, and may contract to pay for such transportation by trip, mile, hour or day.

The prohibitions of the Act of July 16, 1914, 18 Stat. 508 are directed only against the "purchase, maintenance, repair, or operation" of automobiles and other passenger vehicles.

This is interpreted to preclude the hire of an automobile for use by an employee in or about his official station, whether for a continuous period with a driver or for any period without a driver and under the custody and control of the employee. 5 C.G. 183 (1925). When transportation is necessary for specific occasions by employees on a travel status and other means of transportation are not available, the hiring of automobiles or automobile transportation is not prohibited. The conditions under which such arrangement may be made, and the terms of such hiring, are fully set forth in 4 C.G. 836, in passing upon the allowance of travel expenses of federal prohibition agents, including terms of automobile hire:

"To authorize the hire of an automobile as an item of traveling expense, it must appear that the charge is incurred in actual travel upon the public business; and where agents secure such a vehicle intermittently for a trip or a day, such hiring, under the circumstances stated in the paragraph last quoted herein, supra, is a valid charge upon the appropriation available for traveling expenses. Where, however, such hiring is continuous over an extended definite period without reference to particular trips, as in this case, and particularly under an agreement which places the machine in the custody of the Government officer or employee, such continuous possession and continuous availability confers all the necessary benefits derived from temporary ownership, and such arrangement is in contravention of the prohibition against the use of appropriations for the purchase, maintenance, or operation of motor-propelled passenger-carrying vehicles, as stipulated in the act of July 16, 1914, 38 Stat. 508. It was held in 22 Comp. Dec. 188, that where a vehicle is rented for the public purposes for any definite or indefinite period of time, and passes into the control and continuous operation of Government agencies, as distinguished from hiring for a trip, there is acquired a temporary possession and right of property therein, and it is for the time being and for the purpose of the appropriation acts a Government vehicle, 'as much so as if it had been purchased and owned by the Government.'

"The appropriation to which the rental of this automobile is proposed to be charged, 'Enforcement of narcotic and national prohibition acts (Internal Revenue), 1925,' does not specifically provide for the purchase, operation or maintenance of motor-propelled passenger-carrying vehicles. Therefore said appropriation may be used for the hire of an automobile only as a means of accomplishing specific travel necessary in the performance of official duty where other means of transportation are not available. See 24 Comp. Dec. 189; 2 Comp. Gen. 693. Then the hiring of an automobile is shown to be necessary under such circumstances, the rate of such hiring may be by the mile, by the hour, or by the day, as the interests of the Government may require, and when the necessity for such hirings is frequent it would be proper, after advertising for bids for such service, to enter into a contract for such service as may be required throughout the fiscal year, payment to be made only for such time as the vehicle is actually required on official trips. If the needs of the service require a more general hiring--as for a period of 60 days, as in the case here under consideration, where the vehicle is placed at the disposal of the officer or employee at his station to be used if and when needed--the matter is for presentation to the Congress with a view to obtaining specific authority to

use the appropriation for such specific purpose or for the general purpose of purchase maintenance, and operation of motor-propelled passenger-carrying vehicles, as in the case of many other services."

It is to be noted that the Comptroller in the above decision refers to the need of advertising for bids under certain circumstances. There can be no necessity of public bidding in the present case since the Emergency Appropriation Act provides specifically that expenditures "may be made without regard to the provisions of section 3709 of the Revised Statutes."

See, further, Regulations of the U. S. Department of Agriculture, 33 (j), on the subject of Travel Expenses.

(3)

Under certain circumstances employees may be reimbursed for expenses incurred in the use of their own automobiles while traveling on official business.

The Act of February 14, 1931, 46 Stat. 1103 (5 U.S.C.A., Section 73 (a)) provides as follows:

"A civilian officer or employee engaged in necessary travel on official business away from his designated post of duty may be paid, in lieu of actual expenses of transportation, under regulations to be prescribed by the President, not to exceed 3 cents per mile for the use of his own motor cycle or 7 cents per mile for the use of his own automobile for such transportation, whenever such mode of travel has been previously authorized and payment on such mileage basis is more economical and advantageous to the United States."

See also Regulations of the Department of Agriculture, 33 (k).

(4)

Contracts may be made with persons, not employees of the Department of Agriculture, for specific services in connection with the sampling, inspection, and purchase of seeds.

As an additional possibility, it is suggested that special contracts may be entered into for specific services in connection with the sampling, inspection and purchase of seeds, in such manner that the person contracting to render the service will not become an employee of the Government but will act as an independent contractor only. Such arrangements may require the furnishing by the contractor of necessary equipment and incidental service, including automobiles or automobile transportation.

Unless expressly limited, a duty imposed by a statute implies authority to enter into contracts of every nature appropriate to its execution. See U.S. v. Tingey, 5 Pet. 114, 127 (1831). Such contracts may include contracts for personal services in connection with particular transactions. See 21 Op. Atty. Gen. 1, 2 (1893) (implied authority to contract with informants to supply information of frauds practiced on the Government in equipment purchases); 15 Comp. Dec. 757, 762 (1909) (implied authority to contract for attendance of expert witnesses).

Such employment for a specific and limited service does not constitute the person engaged an employee of the United States within the usual meaning of that term, and especially not within the meaning of the term as used in statutes relating to the personnel and internal administration of executive departments. Thus, expert witnesses cannot be regarded as employees or officers within the meaning of Rev. Stat. 2687 fixing the maximum compensation for officers and employees, and they may therefore be paid from a fund for "general expenses." 28 Atty. Gen. 75 (1909). In this opinion the Attorney General quoted the following language from Louisville, Evansville & St. Louis Railroad Co. v. Wilson, 138 U.S. 501, 505 (1891), involving the claim of an attorney acting for the receiver to the priority status accorded employees in a receivership settlement:

"The terms 'officers' and 'employees' both, alike, refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employee. They imply continuity of service, and exclude those employed for a special and single transaction. An attorney of an individual, retained for a single suit, is not his employee. It is true, he has engaged to render services; but his engagement is rather that of a contractor than that of an employee."

See also Auffmordt v. Hedden, 137 U.S. 310, 326 (1890); U.S. v. Germaine, 99 U.S. 508, 510-511 (1878).

If, therefore, contracts are made with individuals not in Government employ for the rendition of specific and limited services in the inspection and purchase of seeds, and if such service is performed as an independent contractor and not on a salary basis or subject to general supervision, such individuals will not by reason thereof become employees of the Government. The terms of such contracts may accordingly be made without regard to the statutes prohibiting the use of general appropriations for the purchase, maintenance and operation of automobiles or limiting the travel allowances of Government employees.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

July 16, 1934.

SUPPLEMENT TO MEMORANDUM OF JULY 13, 1934
TO PHILIP G. MURPHY, CHIEF
COMMODITIES PURCHASE SECTION

Although funds allocated under the Emergency Appropriation Act for the purchase of seeds may not be used for the purchase of automobiles primarily designed for carrying passengers, they may be used for the purchase of trucks. and the use of such trucks for carrying passengers is not prohibited by 38 Stat. 508 (5 U.S.C.A., Sec. 78).

As stated by the Comptroller in 8 Comp. Gen. 636 (1929), in construing 38 Stat. 508:

"The term passenger-carrying vehicle as used in said statute includes all vehicles designed and constructed primarily for carrying passengers regardless of the use to which they may be put."

Thus trucks, even though equipped after their purchase with seats suitable for the accommodation of passengers, are not to be regarded as passenger-carrying vehicles within the meaning of the statute. This was so ruled by the Comptroller General in 2 Comp. Gen. 573 (1923), in passing upon a proposal for the purchase by the Commissioner of Indian affairs of surplus army trucks which it was proposed to fit up with seats in order to transport Indian youths to places of employment.

The Comptroller has also approved the purchase of a Ford truck with passenger and freight body to contain, in addition to the front seat, two seats running the full length of the body, to be used by the Weather Bureau primarily for the purpose of hauling supplies. 3 Comp. Gen. 900 (1924). The Comptroller relied on the fact that the description and photographs of the automobiles indicated that they were "constructed for use primarily in the hauling of supplies and equipment" and also that such was the primary use for which the vehicles were to be purchased, the carrying of passengers being only incidental.

That it is the use for which the automobile was primarily designed and manufactured which determines the propriety of the purchase is indicated by 8 Comp. Gen. 636 (1929). This involved a proposal to buy (1) a roadster with a slip-on body or (2) a de luxe delivery car. The purpose of the purchase in either case was to transport repair men with a limited quantity of repair equipment

to various points in coast guard districts for emergent repair of Government telephone lines. The Comptroller disapproved the purchase of a roadster, stating:

"The fact that the vehicles are so constructed that they may be used for the transport of repair material, tools, testing equipment, etc., by attaching a slip-on body does not authorize considering them as other than passenger-carrying vehicles; the slip-on body being an accessory and not an integral part of the vehicle."

The purchase of the de luxe delivery car was approved because

"while it is designed to resemble a passenger-carrying vehicle and to carry at least one passenger in addition to the driver, it is not designed and constructed for use primarily as a passenger-carrying vehicle within the term as used in the said act of July 16, 1914
* * *."

In a decision addressed to the Secretary of Agriculture, dated April 28, 1931, (A-36376) the Comptroller disapproved of the purchase of a light delivery truck to be used principally in transporting materials from the department shops, but also to be used twice a month as a convoy car to the automobile transporting pay roll cash. The specification called for a light auto delivery truck and did not call for other seats than the driver's seat. The manufacturer's description, however, showed two seats behind the driver's seat. The Comptroller disapproved the purchase in spite of the assurance that the rear seats would not be furnished on the delivered car and that if on the convoy trips additional guards were required, a cross board would be provided from the department's stock. The decision was on the ground that the vehicle was designed and constructed primarily for use in carrying passengers.

That the test is primarily the character of the vehicle at the time of purchase is also indicated in 21 Comp. Dec. 116 (1914):

"The prohibition of the statute is upon the purchase of passenger-carrying vehicles. The distinction between a passenger-carrying and a freight-carrying motor-propelled vehicle is the same as the distinction between a wagon, as commonly understood, and a carriage horse-drawn. The statute deals with the character of the vehicle. A slight change, not destroying its character as a passenger-carrying vehicle, would not exempt the vehicle from the prohibition of the statute. * * *

"While the statute does not prohibit the carrying of a passenger in a motor-propelled or horse-drawn vehicle constructed for handling freight, the statute

does prohibit the purchase of a motor car constructed for the purpose of carrying passengers, and a change in such a vehicle to adapt it to the carrying also of small quantities of tools and materials or for other light express and trucking work does not affect its efficiency as a passenger-carrying car nor change its character as such."

In view of the above decisions, it is my opinion that funds allocated for the purchase of seeds are available, when necessary for carrying out the purpose of the allotment, for the purchase of trucks primarily designed for carrying freight. The fact that such trucks may be used for transporting passengers does not alter the character of the vehicles themselves. As stated in 2 Comp. Gen. 573, 575:

"The trucks here under consideration, even when equipped with seats as hereinbefore indicated, are not to be regarded as passenger-carrying vehicles within the meaning of the provisions of Section 5 of the act of July 16, 1914, or the provision last above quoted from the act of May 24, 1922."

Since trucks when so used are not in the category of "passenger-carrying vehicles," the expenditure of funds for their operation and maintenance is also outside the prohibition of 38 Stat. 508.

It is further my opinion that the purchase of trucks for the purpose indicated is not within the provisions of Section 3 (a) of the appropriation ~~act~~ for the Treasury and Post Office Departments for the fiscal year ending June 30, 1935, (Public 123 - 73rd Cong.) which limits the amount which can be expended for the purchase of any motor-propelled passenger-carrying vehicle" to \$750. No reason appears for interpreting "motor-propelled passenger-carrying vehicle" as used in this act in any different sense from that in which it is used in 38 Stat. 508. A similar provision was included in the Treasury appropriation act for the preceding fiscal year (47 Stat. 1513), and the Comptroller, in dealing with this limitation in connection with the provisions of 38 Stat. 508, has apparently treated the phrase "motor-propelled passenger-carrying vehicle" as used in the same sense in both statutes. See Comptroller General's decision A-53341, dated Feb. 20, 1934.

Francis M. Shea,
Chief of the Brief and Opinion Section,
Office of the General Counsel.

No. 83

BENEFIT PAYMENT TO INSANE PAYEE

In the case of a cotton benefit contract entered into with a resident of the State of Louisiana, who, after performance of the contract, has been adjudged insane, no payment should be made by the Government to any party other than one duly designated by a court as a representative for the incompetent payee.

July 13, 1934

MEMORANDUM TO MR. BUCKLES

Your inquiry of June 9th addressed to Mr. Frank regarding the making of payment on rental and benefit checks where the payee has been declared insane has been referred to me for an opinion which I submit herewith.

OPINION

The Government should not pay the \$36.00 due under the cotton benefit contract to any party other than one duly designated by a court as representative for the incompetent payee, Artmer Copes.

STATEMENT OF FACTS

Artmer Copes of Claiborne County, Louisiana, on July 3, 1933, signed an offer to enter into a cotton benefit contract under the 1933 cotton plow-up campaign. The offer was accepted by the Secretary of Agriculture and the contract is now listed as 74-14-221 with Artmer Copes being designated as the payee. On August 10, 1933, the producer's certificate of performance was filed and on October 12 a check for the amount of \$36.00 was made payable to Artmer Copes. The check was, however, returned by Brodie Fugh, County Agent, to W. R. Fuchs, Disbursing Agent for the Department of Agriculture, for the reason that Copes had been adjudged insane on September 4 and confined in an insane asylum at Pineville, Louisiana. Abbie Copes, wife of the payee named in the benefit check, now desires to be substituted as payee and states that a guardian will not be appointed for Artmer Copes due to the fact that the procedure necessary to obtain an appointment of a guardian for an insane person will cost approximately \$125.00. There is apparently no need for the appointment of a guardian for Artmer Copes apart from the handling of the \$36.00 due under the cotton benefit contract. The question thus presents itself whether payment of the money due under the benefit contract may be made to any party other than a representative duly appointed by a court to act for the incompetent Artmer Copes.

1. There is no authority whereby payment of money due under a benefit contract can be made to any party other than the payee named therein or a duly appointed representative of the payee.

Neither the Agricultural Adjustment Act nor the cotton benefit contract nor the regulations issued in connection therewith sanction the paying of money due an insane payee under a cotton benefit contract to any party except a duly appointed representative of the incompetent person. On the other hand, the laws of Louisiana, the domicile of the payee

Artmer Copes, clearly contemplate the appointment of a guardian or curator to handle the estate of an incompetent person. Article 31 of the Louisiana Civil Code provides:

"Persons of insane mind are those who do not enjoy the exercise and use of reason, after they have arrived at the age at which they ought, according to nature, to possess it, whether the defect results from nature or accident. This defect disqualifies those who are subject to it, from contracting any species of engagement, or from managing their own estates, which are for this reason placed under the direction of curators."

Article 32 of the Code declares:

"Persons who, by reason of infirmities are incapable of managing their own affairs, have their persons and estates placed under the direction of curators."

See, also Articles 389, 2145 and 2147 of the Code which show that payment to a party under legal disability is not valid and indicate that payment must be made to a curator duly appointed by court order. I am, therefore, of the opinion that the Government should not make payment of the \$36.00 in question until a curator is appointed for Artmer Copes or until he is adjudged sane.

II. The procedure in Louisiana for the appointment of a curator for an insane person.

The reason presented for the failure to have a curator appointed for Artmer Copes is that the procedure necessary to obtain such appointment costs approximately \$125.00. If this estimate be correct, it would obviously be unwise to have a curator appointed since apparently Artmer Copes possesses no estate other than the \$36.00 due under the benefit payment contract. An investigation of the statutes of Louisiana dealing with the appointment of a curator indicates that the procedure is somewhat more elaborate than that found in most jurisdictions. However, it is doubtful whether in the present instance the cost will amount to anything approaching the figure of \$125.00 and there is a possibility that a curator can be appointed at a cost less than \$36.00. Thus, I have deemed it advisable to set forth a brief summary of the pertinent Louisiana Civil Code provisions. Initially, however, it should be noted that there is a distinction between the procedure for the commitment of a party to an insane asylum and the procedure for the appointment of a curator to manage the estate of an insane party. The section 3838 of the Louisiana General Statutes making provision for the commitment of a party to an insane asylum has no connection with the provisions relating to the appointment of a guardian for an incompetent person. Oliver B. Ferrell, 152 La. 662, 94 So. 152 (1922); State ex rel. v. Ford, 164 La. 149, 113 So. 798 (1927).

The Louisiana Civil Code beginning at Article 389 provides the steps to be followed for the obtaining of a curator for an insane person. Articles 390 and 391 of the Code designate the parties who may file a petition of interdiction. The designated parties include among their number the wife of the person against whom an interdiction is sought. Article 392 provides that every interdiction shall be pronounced by the competent judge of the domicile or residence of the person to be interdicted. The insanity of the party against whom the petition of interdiction is filed must be proved to the satisfaction of the judge according to Article 393 which also provides that the proof may be established by either written or oral evidence. The last cited article, moreover, provides that the judge may call in experts or others to examine the alleged incompetent person. Article 397 provides that on every petition for interdiction the cost shall be paid out of the estate of the defendant, if he be interdicted, and by the petitioner, if the interdiction prayed for shall not be pronounced. After the judgment of interdiction has been rendered, Article 404 of the Code makes it compulsory upon the judge of the court rendering the judgment to appoint, upon the recommendation of a family meeting, a curator to handle the estate of the party adjudged insane. If a wife is appointed curatrix of her husband, Article 413 of the Code relieves her of the burden of furnishing bond.

Inasmuch as Artmer Copes has been adjudged insane and has been committed to an insane asylum, a petition for interdiction setting forth these facts would seemingly be sufficient to prove to the satisfaction of the court that a curator should be appointed to handle the Copes' estate. It does not appear that this procedure would involve the outlay of much money. The usual cost incident to the summoning of experts obviously would not be incurred in the present instance. Moreover, if the wife, Abbie Copes, obtain appointment as curatrix it would not be necessary for her to furnish bond. For these reasons, I am of the opinion that a further investigation should be made regarding the correctness of the statement that it would cost approximately \$125.00 to have a curator appointed for Artmer Copes.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 84

USE OF TAX PAYMENT WARRANTS

UNDER KERR TOBACCO ACT

A producer who is a party to a reduction contract under the Kerr Tobacco Act may use tax payment warrants in selling tobacco, regardless of whether such tobacco was produced by him or by another, provided such tax payment warrants were originally issued to him.

Opinion Section Memorandum No. 127
Dated July 18, 1934.

July 18, 1934.

MEMORANDUM TO MR. HISS, ASSISTANT TO GENERAL COUNSEL

Replying to your memorandum of June 10, I submit my opinion upon the following:

QUESTION

May a producer who is a party to a reduction contract under the Kerr Tobacco Act (Pub. No. 483-73d Cong.) use tax payment warrants in selling tobacco grown by others?

OPINION

If such tax payment warrants were originally issued to him, the contracting producer may use them in selling tobacco regardless of whether such tobacco was produced by him or by another.

PERTINENT SECTION OF THE ACT

SECTION 5

(a) "In addition to rental or benefit payments which under any provision of existing law the Secretary of Agriculture is authorized to make in connection with agreements with producers providing for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, the Secretary of Agriculture is hereby authorized and directed to issue (in each crop year wherein any type of tobacco is harvested to which the tax is applicable) to such contracting producer nontransferable tax-payment warrants (each such warrant to be expressed in pounds of tobacco of a particular type). Upon surrender of any warrant by any contracting producer to the collector, it shall be accepted by the collector and the Secretary of the Treasury in payment of the tax on any sale by such contracting producer of the type of tobacco specified in the warrant not exceeding in amount the amount of tobacco covered by such warrant. Any contracting producer shall be entitled to receive such warrants covering amounts of any type of tobacco produced by him equal (1) to the number of pounds of tobacco of such type which such contracting producer is permitted to market under any agreement between him and the Secretary of Agriculture, or (2) to the number of pounds of tobacco of such type which the Secretary of Agriculture estimates may be produced on a percentage of a base acreage, which percentage and base acreage shall be determined as provided in any agreement between the Secretary of Agriculture and such contracting producer."

DISCUSSION

Section 3 (a) of the Kerr Tobacco Act provides for the levy of a tax upon the sale of tobacco. Section 5 (a) of the Act provides for the issuance to producers who enter into agreements with the Secretary of tax payment warrants.

The last sentence in Section 5 (a) indicates that each contracting producer is entitled to receive tax payment warrants in respect to tobacco of a type which he himself produces. The exact language is:

"shall be entitled to receive such warrants covering amounts of any type of tobacco produced by him equal * * * to * * *" etc.

It is not provided that the warrants shall cover only "tobacco produced by him" but "amounts of any type of tobacco produced by him equal to" a certain number of pounds determined in either of two ways. The phrase "produced by him" as it appears in the passage just quoted modifies only the phrase "type of tobacco" and is not a limitation upon the "amounts" which the warrants are to cover. The "amounts" are therefore to be not what the contracting grower himself produces but the number of pounds of tobacco (1) which the producer is permitted to market under the terms of the agreement, or (2) which it is estimated may be produced on a certain acreage fixed according to the terms of such agreement. The producer may accordingly be limited in the amount which he may be permitted to market under the agreement but there is no provision limiting this amount to tobacco which he has himself produced.

The first and second sentences of Section 5 (a) deal with the character of the tax-payment warrants and their acceptance by the collector and the Secretary of the Treasury in payment of the tax. The warrants are non-transferable, and each warrant is "to be expressed in pounds of tobacco of a particular type." No discretion is given the collector or the Secretary of the Treasury as to the acceptance of any warrant in payment of the tax, upon its surrender by any contracting producer.

"on any sale by such contracting producer of the type of tobacco specified in the warrant not exceeding in amount the amount of tobacco covered by such warrant."

If the sale by the contracting producer is of a type of tobacco not specified by the warrant, the warrant need not be accepted. There is no corresponding provision that the tobacco sold must have been grown by the contracting producer, and no authority is given to the collecting officials to refuse acceptance on the ground the contracting producer is not the actual grower.

It thus appears that nothing in Section 5 (a) limits the contracting producer, in the use of tax payment warrants, received by him from the Secretary, to sale of tobacco produced by him. If, therefore, a contracting grower fails to produce his total allotment, there can be no valid objection to his using surplus warrants in his possession in selling tobacco of the type specified in the warrant although produced by another. It is of course essential in such case that the sale shall satisfy the requirement that it be a "sale by such contracting producer." At the same time the purpose of such a scheme will be defeated if the contracting producer making the sale has acquired title to the tobacco by purchase from the grower, since in that case the tax would have been payable at the time of such purchase. The question assumes that the contracting producer will have authority, such as that ordinarily possessed by factors, to deal with the tobacco and to pass title, although not himself the owner thereof.

Francis M. Shea,
Chief, of Brief and Opinion Section,
Office of the General Counsel.

No. 85

COUNTY ALLOTMENTS UNDER BANKHEAD ACT

Under Section 5(b) of the Bankhead Act allotments to counties in states coming within the proviso of Section 5(a) must be made on the basis and ratio fixed in the latter subsection.

Hence the allotments to counties may not be shifted from one county to another in order to allow adequate allotments to counties recently coming into cotton production, by taking away or reducing allotments from counties which no longer grow any cotton, or which now grow substantially less cotton than during the preceeding five crop years.

Opinion Section Memorandum No. 129
Dated July 18, 1934.

July 18, 1934

MEMORANDUM TO MR. COBB

Re: Allotment of 200,000 bales of cotton in California

Pursuant to your inquiry of May 4, addressed to Mr. Hiss, I submit my opinion upon the following:

QUESTION

Are allotments to counties within a State coming under the proviso to Section 5(a) of the Bankhead Act to be made on the basis and ratio referred to in that subsection, or may allotments be shifted from one county to another in order to allow adequate allotments to counties recently coming into cotton production by taking away or reducing allotments from counties which no longer grow any cotton or which now grow substantially less cotton than during the preceding five crop years.

OPINION

Under Section 5(b) of the Act allotments to counties in States coming within the proviso in Section 5(a) must be made on the basis and ratio fixed in the latter subsection. Hence the allotments to counties may not be shifted in accordance with the plan proposed.

DISCUSSION

Section 5 of the Bankhead Act reads as follows:

"Sec. 5. (a) When an allotment is made, in order to prevent unfair competition and unfair trade practices in marketing cotton in the channels of interstate and foreign commerce, the Secretary of Agriculture shall apportion to the several cotton-producing States the number of bales the marketing of which may be exempt from the tax herein levied, which shall be determined by the ratio of the average number of bales produced in each State during the five crop years preceding the passage of this

Act to the average number of bales produced in all the States during the same period: Provided, however, That no State shall receive an allotment of less than two hundred thousand bales of cotton if in any one year of five years prior to this date the production of the State equalled two hundred and fifty thousand bales. It is prima facie presumed that all cotton and its processed products will move in interstate or foreign commerce.

(b) The amount allotted to each State (less the amounts allotted under section 8) shall be apportioned by the Secretary of Agriculture to the several counties in such State on a basis and ratio, applied to such counties, similar to that set forth in subsection (a), except that, for the purposes of this subsection, there shall be excluded from the calculation of the average production of cotton in any county an amount of cotton produced in such county during any crop year or years during which the Secretary of Agriculture finds that production of cotton in such county was reduced so substantially by unusual drought, storm, flood, insect pests, or other uncontrollable natural cause that the inclusion of the cotton produced in such crop year or years would result in an apportionment to such county based upon an abnormally low production of such county, and in such cases the average production shall be calculated on the basis of the crop years and production of the years remaining of the period set forth in subsection (a)." (Underscoring supplied.)

Where the terms of a statute are clear and unambiguous and its meaning is unmistakable, there is no room for construction. Yerke v. United States, 173 U.S. 439 (1898); Hamilton v. Rathbone, 175 U.S. 414 (1899). This is an axiomatic principle which disposes of the question here presented. Section 5(b) of the Act, the provision dealing with county allotments, specifically declares that the amount allotted to each State shall be apportioned to the counties in such State on the basis and ratio set forth in Section 5(a). From the plain language of the Section it is obvious that the proviso in the preceding Section concerning State allotments does not modify the system set up for calculating county allotments within States which come within the proviso.

The legislative history of the portions of the Act in question supports conclusively the view that it was not the intention of Congress that States coming under the proviso in Section 5(a) should be excluded from the provisions concerning county allotments laid down in Section 5(b).

The proviso under discussion was inserted with another amendment which was subsequently struck out, while the Bill was before the Senate. Except for this change, the passages relevant to the issue here remained the same through the history of the Act. The only reference to the inclusion of the amendment in the statement of the Managers on the Part of the House reads as follows:

"This amendment provides a minimum allotment of 200,000 bales of tax-exempt cotton to each State if in any one of the 5 years preceding the enactment of the act the production of such State equalled 250,000 bales. The House recedes."

Had it been the intention of Congress that the system of county allotments should be modified for those States coming within the proviso, such a provision could easily have been inserted at the same time. The failure of Congress to make any changes to this effect in the Section pertaining to county allotments argues, clearly, that such was not its desire.

Additional support for the interpretation here suggested is found in the canons of construction relating to provisos. It is settled that a proviso is deemed to apply only to the immediately preceding clause or provision (Henderson's Tobacco, 11 Wall. 652 (1870)); Dollar Sav. Bank v. U.S., 19 Wall. 227 (1873), and that as its appropriate office is to qualify preceding matter it should be confined to what precedes, unless it is clear that it was intended to apply to subsequent matter. The matter preceding the proviso in question deals with allotments to States, and the operation of the exception must therefore be confined to that subject. The Section concerning county allotments, it has been seen, occurs in a later portion of the Act, to which the proviso, on these principles, has no application.

Furthermore, it is an established rule of interpretation that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted and excludes all other exceptions. Equitable Life Assurance Soc. v. Clements, 140 U.S. 226 (1891); Arnold v. United States, 147 U.S. 494 (1893). Under Section 5(b) certain counties are explicitly excluded from the method of allotment fixed therein. On the foregoing rule it follows that since counties in States subject to the proviso in Section 5(a) were not also specifically excepted, it was not the intention of Congress that they should receive special treatment.

A statute that directs a thing to be done in a particular manner ordinarily implies that it shall not be done otherwise. Raleigh etc. Co. v. Reid, 13 Wall. 269 (1871).

In addition, it is settled that a contemporaneous construction of a statute by those charged with its execution and application is entitled to great weight. United States v. Vowell, 5 Cranch 368 (1809); Edward's Lessee v. Darby, 12 Wheat. 206 (1827); Grant v. Raymond, 6 Pet. 218 (1832). This Department has already interpreted the portion of the Bankhead Bill in question here.

In Form No. B.A.-1 issued May 2, 1934, for the information of cotton producers by the Cotton Production Section of the Agricultural Adjustment Administration, the following interpretation of the provision here in question appears:

"Question 49. How will the allotments be made to counties?

Answer. Not less than 90% of the allotment to each State will be prorated to the various counties within the State according to the percentage that the average production of each county is of State production for the 5 cotton crops of 1928 - 1932, inclusive."

It is therefore clear that it was the sense of the Department that allotments to counties in States covered by the proviso in Section 5(a) must be made, as provided in Section 5(b), on the basis and ratio set out in Section 5(a).

Finally, on the contrary interpretation of Section 5(b), no formula whatever would be provided in the Act on the basis of which allotments could be made to counties in States coming within the proviso in Section 5(a). But since the whole tenor of the statute evidences the purposes of Congress to set up a definite scheme of State, county and individual allotments, it could not have been the intention of the legislature to accord the Secretary unlimited discretion in making allotments to counties in States coming within the proviso in Section 5(a). In the absence of clear language to that effect it is rather to be assumed that Congress meant to authorize these allotments to be made in the manner specified for other States; namely, on the basis and ratio set forth in Section 5(a).

Francis M. Shea,
Chief of Brief and Opinion Section,
Office of the General Counsel.

No. 85

RESTRICTIONS UPON IMPORTED SUGAR TO BE
EXPORTED AFTER PROCESSING

Under the Agricultural Adjustment Act, as amended, imported raw sugar which is intended for export immediately after refining should not be charged at the time of importation against the quota of the foreign country from which it comes. However, importers who intend to make such use of the sugar imported should be required to put up a bond in an amount equal to three times the value of the sugar in order to insure the United States against failure to export.

Such imported sugar as will be employed in the manufacture of other products after refining and before export is sugar imported "for consumption" but should not be charged against the quotas of the countries from which it comes if the bond described above is given.

July 21, 1934.

MEMORANDUM TO DR. BERNHARDT

Re: Restrictions imposed by terms of Sugar Bill on importation of foreign full duty sugar which is to be exported after processing.

You have inquired about the restrictions imposed by the terms of the Sugar Bill on the importation of foreign full duty sugar which is to be exported after processing. You are interested in determining what procedures are permissible in dealing with situations (1) where raw sugar is imported, refined, and then immediately exported, and (2) where sugar is to be further processed after refining and before exportation.

OPINION

(1) The importation of raw sugar which is intended for export immediately after refining should not be charged at the time of its import against the quota of the foreign countries from which it comes. This type of sugar is not imported for consumption, and is therefore not subject to the Secretary's power to forbid imports beyond quota. However, these importers who intend to make the above described use of such sugar should be required to put up a bond in an amount equal to three times the value of the sugar in order to insure the United States against failure to export.

(2) Such sugar as will be employed in the manufacture of other products after refining and before export is sugar imported for consumption, but should not be charged against the quotas of the foreign countries from which it comes if the bond described above is given.

DISCUSSION

Parts of Section 8a (1) (A) (i) of the Sugar Act are important to the determination of the procedure to be followed with reference to foreign raw sugars which are imported into continental United States for processing and are then exported. The significant parts of section (A) (i) read as follows:

"(the Secretary of Agriculture may)"

"Forbid processors, handlers of sugar, and others from importing sugar into continental United States for consumption, or which shall be consumed, therein, and/or from transporting to, receiving in, processing or marketing in,

continental United States, * * * for consumption in continental United States, sugar from * * * foreign countries, * * * in excess of quotas fixed * * * And provided further, That any imported sugar, with respect to which a drawback of duty is allowed, under the provisions of section 313 of the Tariff Act of 1930, shall not be charged against the quota established by the Secretary of Agriculture hereunder for the country from which such sugar was imported, * * *"

The first question to be answered is, "Does sugar imported only to be processed and then exported fall into the category of sugar used for consumption in continental United States?" It seems clear that sugar which is only refined in continental United States cannot be said to be consumed therein. The fact that section (A) (i) quoted above speaks of "processing * * * for consumption in continental United States" indicates that there may be processing that is not consumption in continental United States. Therefore, the refining of sugar, which is a first processing, is not a consumption of sugar. However, later processings of sugar may be treated as a consumption thereof. There is no requirement that sugar be purchased by an ultimate consumer before its consumption may be said to have taken place. It seems reasonable to conclude that "consumption" would cover use in the manufacture of some other product other than sugar.

Any other interpretation would lead to the conclusion that sugar imported from a foreign country, refined and further processed in this country, and then exported in some form other than sugar, is not imported for consumption. Such a position would make the proviso with reference to drawbacks totally superfluous and of no use. For the only sugar imported from foreign countries with reference to which the drawback proviso applies is sugar exported in some form. Therefore, it seems reasonable to distinguish between the mere change in the physical characteristic of sugar by the refining of it and the conversion of refined sugar into a constituent of some other distinct product.

With this distinction, one can conclude that sugar imported, refined, and then immediately exported is not sugar imported for consumption in continental United States under the terms of the Act. Therefore, such sugar is not subject to the quota provisions. To guard against the danger that some importer may violate his promise to export sugar immediately after refining, a bond should be demanded. The amount of the bond ought to equal the liability imposed by the Act upon those who import sugar in excess of the quota. Such liability, as set forth in section 5 of the Sugar Act, is three times the current market value of the sugar imported in excess of the quota. In order to insure the validity of the bond, a regulation under section 10 (e) of the Act ought to be issued requiring such a bond.

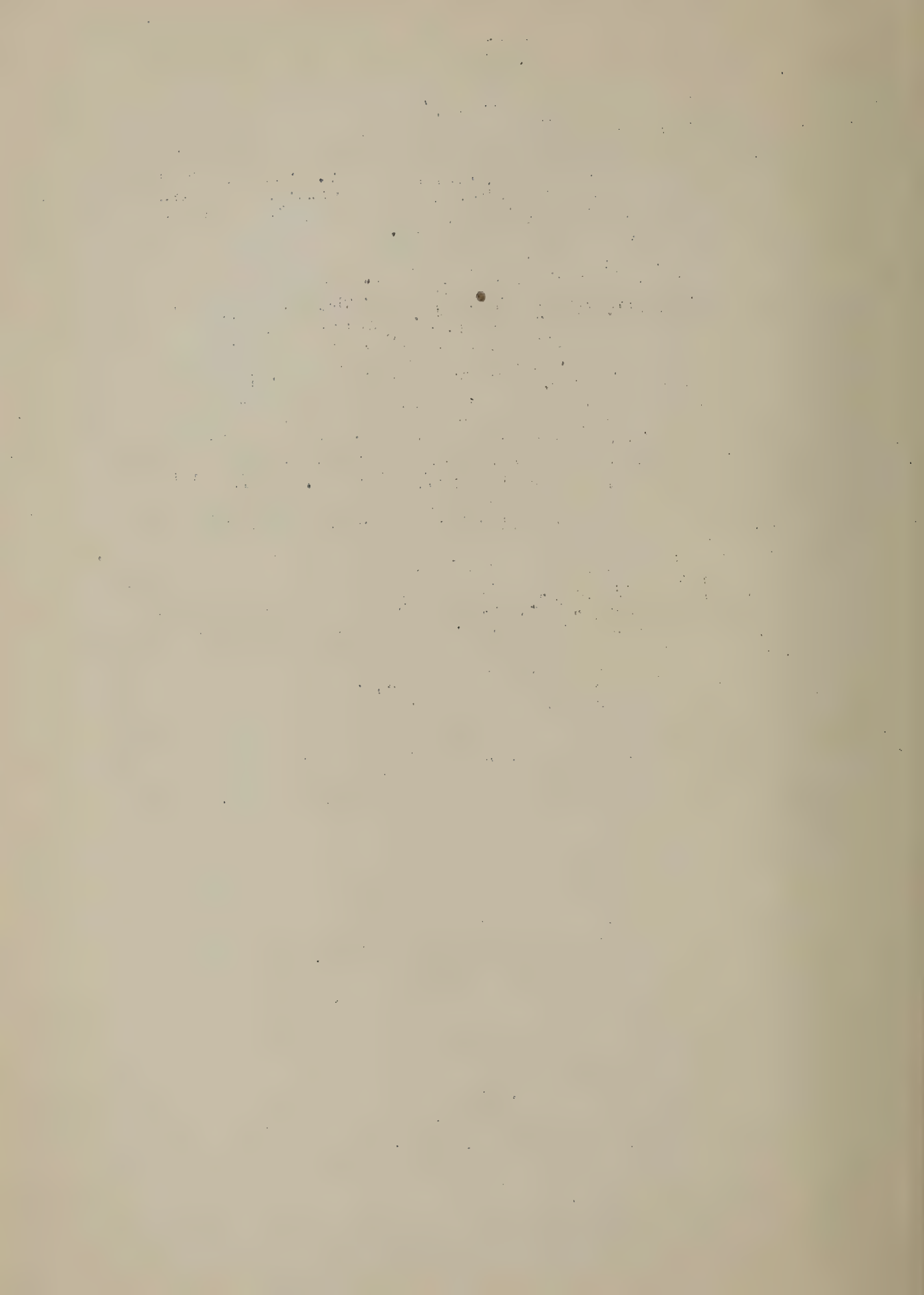
In reference to such sugar as will not be exported after it is refined, but first will be used in the manufacture of some other product which itself will be exported, the drawback proviso of the Sugar Act

will apply. There are two possible interpretations of this proviso; One is that not until an actual drawback has taken place can the sugar imported be deducted from the charge against the quota. The other interpretation is that any sugar imported into this country with respect to which a drawback will be allowed should not in the first place be charged against the quota of the foreign country.

The second interpretation is to be preferred. The proviso reads "That any imported sugar, with respect to which a drawback of duty is allowed" shall not be charged against the quota. This does not indicate that the sugar when originally imported shall be charged against the quota and then deducted from the quota when exported, but that the charge shall not take place at all. Furthermore, the other interpretation would lead to strange results. Thus, if 10,000 tons of sugar were imported from a foreign country with a quota of 5,000 tons, of which only 5,000 tons would be exported, then if the first 5,000 tons imported were not to be exported no further imports could take place. On the other hand, if the 5,000 tons intended for export were the first to be imported then the full 10,000 tons could be imported during the quota year.

The only factor which stands in the way of this interpretation is that the proviso reads "with respect to which a drawback of duty 'is allowed'" rather than "is allowable". However, the reading does not prevent the interpretation that "is allowed" is a descriptive phrase of the nature of the sugar rather than a statement of a precedent event which must take place to prevent a charge against the quota. However, whatever obstacle be presented by the language is overcome by the consideration set forth in the previous paragraph. Hence, by the terms of this drawback provision any sugar which is imported with the intention that it be exported in any form should not be charged against the quota, but a bond similar to that set out above should be demanded from the importer.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.



No. 87

CONDITIONING OF SUGAR ALLOTMENTS UPON

PRICES PAID PRODUCER

The Secretary has no power to condition allotments made to processors in the continental United States beet sugar producing area upon the existence and the maintenance by them of a just relationship between the price paid by the processors to the producers and the price received by them.

The Secretary is without power to cancel or adjust an allotment to any processor because of a failure to establish or maintain such relationship.

Opinion Section Memorandum No. 134
Dated July 21, 1934.

July 21, 1934.

MEMORANDUM TO MR. SAVOY

I submit herewith my reply to your memorandum of July 18 dealing with a procedure for the adjustment or revocation of allotments to processors, in the event of their failure to maintain a just relationship between the prices paid by the processors to the producers and the price received by processors.

Statement of Suggested Procedure

You set forth two ways of effectuating such a procedure.

(1) The first is by way of a declaration in the order promulgating allotments for processors in the continental United States beet-sugar producing area to the effect that their allotments are conditioned upon the existence and the maintenance by them of a just relationship between the price paid by the processors to the producers and the price received by them. It is further intended to provide that any person considering himself aggrieved by a processor's failure to establish or maintain the required relationship may make application under oath, setting forth the relevant facts and the data he wishes to cite in support thereof, to the Secretary of Agriculture, for the adjustment or cancellation of such processor's allotment. This action of the Secretary of Agriculture, however, is to be performed pursuant to a public hearing thereon.

(2) You also propose alternative language for use in the order:

"Whenever, after notice and hearing, as provided in Continental United States Beet Sugar Regulations, Series I, the Secretary finds that any processor to whom an allotment has been made has failed to establish and maintain a just relationship between the price received by him from sugar manufactured therefrom, and determines what would be a just price for such processor to pay such producers, and finds that such processor has failed to establish and maintain such price, the Secretary will adjust or revoke the allotment to such processor in such manner as will effectuate Section 8a(1) of the Act."

United States Beet Sugar Regulations, Series I, is to be drafted to provide an opportunity for producers of sugar beets in the continental United States beet-sugar producing area or processors thereof who consider themselves aggrieved by any allotment because the person to whom such allotment has been made has failed to establish or maintain this just relationship or for any other reason or because of the Secretary's failure to make any allotment to any person, to

"file with the Secretary an application, under oath, for a public hearing, setting forth good cause why such a hearing should be had and data in support thereof; and thereafter, the Secretary will afford such person an opportunity for a public hearing, at which all interested persons may be heard, such hearing to be held in the manner hereinafter provided. * * *"

Questions Stated

You ask three questions with respect to the above-mentioned procedure:

- (1) Considering the declared policy of the Act and the standards set forth in the first paragraph of Section 8a, has the Secretary the power and duty to make the condition set forth in alternative (1), or to cancel or adjust an allotment as proposed in alternative (2)?
- (2) If he has such a power, is the exercise thereof open to constitutional objection in the case of contracts between processors and producers entered into (a) prior to, (b) subsequent to, the effective date of the Sugar Act or the order of the Secretary pursuant thereto?
- (3) Are there special legal objections to the forum set up for the consideration of the question of whether a just relationship exists or is being maintained in particular cases?

Answer

I conclude that the Secretary of Agriculture has neither the power to make the condition set forth in alternative (1) of the "Statement of Suggested Procedure", nor the power to cancel or adjust an allotment as proposed in alternative (2) thereof. In view of this answer to your first question, it is unnecessary to consider in detail your second and third queries.

DISCUSSION

Both forms of procedure which are set forth in your memorandum are dependent for their statutory justification, if any, upon the introductory portions of Section 8a(1) of the Agricultural Adjustment Act by the Sugar Act. These in effect state that, in issuing orders or regulations in connection with the making of quotas and allotments in order to effectuate the declared policy of the Act, the Secretary must have

"due regard to the welfare of domestic producers and to the protection of domestic consumers and to a just relation between the prices received by domestic producers and the prices paid by domestic consumers,"

Inasmuch as the language of the Act differs from the language to be inserted in the proposed Secretary's orders and regulations, it is suggested that the language of both forms of the order and of United States Beet Sugar Regulations, Series I, supra, be amended at least to include the words of Section 8a(1), if not to conform entirely thereto.

It may be assumed that the price paid by the processor to the producer of sugar beets will be identical with "the prices received by domestic producers", but it is not apparent that the prices received by processors will be identical with "the prices paid by domestic consumers". Nothing appears in Section 2 (3) of the Agricultural Adjustment Act, setting forth its original declaration of policy, which would help remedy this limitation inherent in Section 8a (1). It is true that the price received by processors will have some connection with "the prices paid by domestic consumers", but it is entirely possible that this causal connection may be eclipsed by the presence of other factors conditioning the price which will be paid by the domestic consumers, over which other factors the processor may have no control. It will therefore be impossible, consistently with the purposes of the Sugar Act, to condition an allotment upon, or render it subject to adjustment or revocation in the event of a failure to maintain, a just relationship between the price paid to domestic producers and the price received by processors unless it be clearly shown that the prices paid by domestic consumers have a clear and inescapable connection with the price which will be received by the processor. (Should such proof be forthcoming, I assume that it will contain, among other things, a definition of the word "processor".) However, even if such a causal connection be demonstrated, it is recommended that the language of any order or regulation which will be issued by the Secretary of Agriculture pursuant to the purposes contemplated in your memorandum contain, in addition to the language which is at present in the proposed draft of orders and regulations, additional language incorporating as far as possible the language of the Agricultural Adjustment Act as amended.

My answer to your first question therefore must be in the negative, pending a rephrasing of the language which is at present incorporated in your suggested provisions and/or the submission of an economic brief which will demonstrate that the maintenance of a just relationship between the price paid by the processors to producers and the price received by processors will be necessary to the maintenance of "a just relation between the prices received by domestic producers and the prices paid by domestic consumers".

Even with this difficulty removed, the statutory authority for the Secretary of Agriculture to readjust an allotment in the event of a failure to maintain the above-described just relationship is not as evident as may at first sight appear. I consider Section 8a to state

the Secretary's duty to be to effectuate the declared policy of the Act and his power to be (a) to issue from time to time orders or regulations (b) setting up import quotas and making allotments (c) in order to effectuate the declared policy of the Act (d) but which will protect domestic producers and domestic consumers and preserve a just relation between the prices received by domestic producers and the prices paid by domestic consumers. In other words, on a literal analysis of the language of the statute, the maintenance of the "just relation" is secondary to the effectuation of the declared policy of the Act, which still remains the Secretary of Agriculture's primary objective. In view of the fact that Section 8a (1) confers a very broad authority upon the Secretary of Agriculture, it probably will, following the accepted standard of statutory interpretation, be construed very strictly in order to safeguard it from the objection that it involves an unconstitutional delegation of legislative power to the Secretary of Agriculture. There therefore is a distinct probability that the provision will be construed to mean that the Secretary is to set up his import quotas and make his allotment primarily with a view to effectuating the declared policy of the Act, but that, in doing so, he is not unduly to prejudice the various interests and the relations which are protected by the preamble to the import and allotment provisions of the Jones-Costigan Act. Instead, therefore, of having a positive mandate to establish and maintain "a just relation between the prices received by domestic producers and the prices paid by domestic consumers", the Secretary will in all likelihood be limited to the negative task of seeing to it that his allotments do not endanger the maintenance of the above-described "just relation".

More important, however, it seems clear that it is the orders or regulations of the Secretary setting up quotas and making allotments or readjusting such allotments which must have due regard to the considerations stressed at the beginning of Section 8a (1), and not the processor. In other words, I would say that the only legislative authority under the Sugar Act to the Secretary of Agriculture is to set up quotas and make allotments which will effectuate the declared policy of the Act and not prejudice the various interests to be conserved under the introductory portions of Section 8a (1). There is no legislative authorization for the Secretary using his power over allotments as a club for the elimination of unjust price conditions or any other business conditions which are not direct outgrowths of the allotments themselves. Stated briefly, the Secretary's mandate is to make allotments which will have due regard to a just relation between the two sets of prices and not to make allotments in order to make processors preserve this just relation. The Sugar Act was grounded upon considerations similar to those contained in other emergency agricultural legislation, to-wit, that the problem of agricultural distress can be solved either by the elimination of surpluses from market or by the expansion of markets to absorb what would otherwise be destructive surpluses. In the absence of possibilities for the expansion of markets, the solution adopted in the Sugar Act was that of restricting importation and factory production by quotas and allotments as a means of eliminating undesirable surpluses. If the legislatively conferred authority be inadequate to achieve the policy objectives of the Sugar Act, the resultant state of affairs is merely a reflection on the legislative wisdom and not a

ground for enlarging the powers of the Secretary beyond his proper statutory authority. It seems that the suggested procedure will be broad enough to help effectuate purposes not within such a restricted legislative mandate, and should therefore be considered invalid.

Inasmuch as the answer to your first question is in the negative it does not appear necessary to address one's self to the second except for the rule of statutory construction that in cases of ambiguity in a statute a construction will be adopted which will preserve the statute from the possibility of constitutional objection. For this reason an answer to question No. 2 to the effect that the projected exercise of power by the Secretary of Agriculture is open to possible constitutional objection would serve to confirm the negative reply to question No. 1.

Even conceding that the statute were susceptible of an interpretation conferring the power above outlined upon the Secretary, nevertheless the exercise thereof would be a matter open to serious constitutional doubt. Waiving the point above made that such a standard should be established by the Secretary himself in general regulations or orders and not as a result of the examination of specific cases, the concept of just relation between prices paid by domestic producers and prices received by domestic consumers may readily be argued to be too indefinite to be valid constitutionally. As against the objection that a statute involves an unconstitutional delegation of legislative power, the only defense is that the legislature set up sufficiently definite standards for the administrative body to act on. Since in the present case we are dealing with what is in its undefined state a very vague concept, therefore the argument of unconstitutional delegation acquires considerable potency. Furthermore, the procedure herein discussed seems to be lacking in some of the essential elements of due process. The processor has no idea of what shall constitute a just relationship prior to the quasi-judicial determination of the Secretary provided for in the suggested procedure, and there is no provision protecting contracts which it has already entered into or giving it time to conform its business arrangements to the Secretary's decision. Other considerations dealing with constitutionality would be related to the specific case in which a protest was made by a processor and therefore cannot be discussed here, (note also that the constitutional discussion contained in this paragraph is intended to be merely suggestive and not at all definitive), but there is present enough of a possibility that the power which it is proposed to confer upon the Secretary will be held unconstitutional, to buttress the statutory lack of authority which appears clear from a consideration of the language and purposes of the Jones-Costigan Act.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 88

APPLICATION OF SECTION 213 (47 STAT.,
c. 314; 5 U.S.C.A., 35a) TO APPOINTMENTS UNDER THE
AGRICULTURAL ADJUSTMENT ACT

In appointing a market administrator under the Agricultural Adjustment Act the Secretary is not controlled by Section 213 (47 Stat., c. 314; 5 U.S.C.A., 35a) requiring that "in the appointment of persons to the Classified Civil Service, preference shall be given to persons other than married persons living with husband or wife, such husband or wife being in the service of the United States or the District of Columbia."

July 23, 1934

MEMORANDUM TO MR. LAUTERBACH

In reply to your memorandum dated July 18, 1934, I submit my opinion upon the following:

Question

Is the Secretary of Agriculture, in designating a Market Administrator under the Des Moines Milk License, controlled by Section 213, of 47 Stat., c. 314 (1932)?

Opinion

The Secretary is not controlled by Section 213 of the statute in question.

Discussion

Section 213, so far as it affects appointment, applies, by its terms, only to appointments to the classified Civil Service.

The Secretary is empowered by Section 10(a) of the Agricultural Adjustment Act to make appointments pursuant to the Act without regard to Civil Service laws or regulations.

The form used by the Secretary in designating Market Administrators indicates that he has chosen to exercise his power without the Classification Act. The designation is stated to be made pursuant to the Milk License rather than pursuant to the power to appoint to the Civil Service. It is stated to be revocable by the Secretary. Compensation is fixed at an amount determined to be reasonable by the Secretary.

The Secretary may, of course, give due weight to the congressional policy indicated in the statute and by the request of a committee on expenditures in the Executive Department of the House of Representatives. He is not bound, however, by Section 213 and may exercise an independent judgment. I agree with you that the objection raised by Mr. McMillan to Mr. Perdue's appointment based upon Mrs. Perdue's capacity as a government employee is not, in view of the nature of Mr. Perdue's position, an important one.

Telford Taylor
Acting Chief, Brief and Opinion Section
Office of the General Counsel

No. 89

EXEMPTION OF EXISTING SUGAR STOCKS FROM
BANKHEAD ACT QUOTAS

Section 8 a (1) (B) of the Sugar Act applies only to sugar produced in the relevant areas in the marketing year in which the quotas obtain; hence existing stocks of sugar from these sources may be marketed in excess of the specified quotas.

Opinion Section Memorandum No. 150
Dated July 23, 1934.

July 23, 1934.

MEMORANDUM TO MR. GILCHRIST

Pursuant to your inquiry of June 21st, I reply as follows:

QUESTION I.

Under Section 8 a (1) (B) of the Sugar Act may the Secretary prohibit marketing, etc. of existing stocks of sugar produced from sugar-beets and/or sugarcane in the beet-sugar producing area, in excess of the specified quotas, or is he limited to forbidding such marketing, etc. of sugar produced from sugar-beets and/or sugarcane grown during the present calendar year in the sugar producing areas in excess of specified quotas.

REPLY

Section 8 a (1) (B) of the Act applies only to sugar produced in the relevant areas in the marketing year in which the quotas obtain; hence existing stocks of sugar from these sources may be marketed in excess of the specified quotas.

DISCUSSION

The relevant portion of Section 8 a (1) (B) of the Sugar Act reads as follows:

"(B) Forbid processors, handlers of sugar, and others from marketing in, or in the current of, or in competition with, or so as to burden, obstruct, or in any way effect, interstate or foreign commerce, sugar manufactured from sugar-beets and/or

sugarcane; produced in the continental United States beet-sugar-producing area, the States of Louisiana and Florida, and any other State or States in excess of the following quotas, for any calendar year, except as provided for in subsection (2) of this section: United States beet-sugar area; one-million five hundred and fifty thousand short tons raw value; the States of Louisiana and Florida, except as may be provided under paragraph (C) of this subsection, two hundred and sixty thousand short tons raw value, * * * ." (Italics supplied)

The clear purport of the language "sugar manufactured from sugar beets and/or sugarcane, produced in the continental United States beet-sugar-producing areas * * * in excess of the following quotas for any calendar year * * *" is that the quotas laid down for the given areas mentioned in the Section apply only to sugar grown in those States during the year in which the restriction is in effect and do not apply to existing supplies of sugar grown before the introduction of the system under the Act.

The view here presented of the scope of the subdivision is fully supported by the history of the Section in its initial drafts before its passage in its present form. The provision corresponding to the Section here in question, as introduced in the House of Representatives (H. R. 7907) reads as follows:

"(B) Forbid processors, handlers of sugar, and others from marketing, in the current of, or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce, sugar manufactured from sugar beets and/or sugarcane produced in the continental United States beet sugar producing area, the State of Louisiana, the State of Florida, and any other State or States, in excess of quotas equal to the production or the marketings of sugar manufactured from sugar beets and/or sugarcane produced in such area, the State of Louisiana, the State of Florida, and such other state or states respectively, in such three years, respectively, in the years 1925-1933, inclusive, as the Secretary of Agriculture may, from time to time, determine to be the most representative respective three years, and the Secretary of Agriculture may by orders or regulations allot

such quotas from time to time among the
processors, handlers of sugar and others
* * *

It will be noted that the changes made in the Bill as it finally passed consisted of the definite specification of the exact quantity of the respective quotas to be applied, and the insertion of the words "for any calendar year". From the insertion of the latter phrase it may safely be inferred that Congress intended to clarify and emphasize the fact that the quotas enumerated were to apply only to sugar produced in the year for which the quotas are in effect.

Further support for the view here presented is found in the administrative interpretation of this provision made by the Department.

It is settled that a contemporaneous construction of a statute by those charged with its execution and application is entitled to great weight. United States v. Vowell, 5 Cranch. 368 (1809); Edward's Lessee v. Darby, 12 Wheat. 206 (1827); Grant v. Raymond, 6 Pet. 218 (1832). In "General Sugar Quota Regulations, Series 1, Consumption Requirements and Quotas" I (3) it is provided:

"That the quotas for the United States beet-sugar area and the States of Louisiana and Florida are accordingly fixed, pursuant to paragraph 2 of these regulations, as follows:

| | |
|--|-----------|
| <u>Continental United States beet-sugar-producing area</u> | 1,556,166 |
| The States of Louisiana and Florida . | 261,034" |
| (Underscoring supplied) | |

And Section II, Subdivisions (23) and (24) of the same Regulations read as follows:

"(23) Processors, handlers of sugar and others, are hereby forbidden from marketing in, or in the current of, or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce, sugar manufactured from sugar beets and/or sugar cane, produced in the continental United States beet-sugar-producing area, in excess of the quota of 1,556,166 short tons,

raw value fixed by paragraph 3 of these regulations.

"(24) Processors, handlers of sugar, and others are hereby forbidden from marketing in, or in the current of, or in competition with, or so as to burden, obstruct or in any way affect, interstate or foreign commerce, sugar manufactured from sugarcane and/or sugar beets, produced in the States of Louisiana and Florida in excess of the quota of 261,034, short tons, raw value, fixed by paragraph 3 of these regulations."

It is clear that these allotments under Section 8 a (1) (B) are based on the assumption that the quotas under the Act apply only to the sugar produced in the calendar year in which the quotas obtain, since the entire quantity of marketable sugar is allotted under the Section without any provision whatever being made for existing stocks produced in a previous year. On any hypothesis other than the one here advanced, namely, that the quotas set up in the Bill refer only to sugar produced in the year in which the quotas are in effect, such existing stocks would be completely unmarketable in the United States. The Conclusion must therefore be, in accordance with the administrative interpretation - that existing stocks of sugar do not come within the purview of the provision here in question.

Finally, the construction here contended for is supported by the rule of interpretation that, where an Act is fairly susceptible of two constructions, one of which will uphold the validity of the Act while the other will render it unconstitutional, the one which will sustain the constitutionality of the statute must be adopted. United States v. Ceombes, 12 Pet. 72 (1838); Knights Templars' Indemnity Co. v. Jarman, 187 U. S. 197 (1902). Should the Act be interpreted to exclude the marketing or processing of existing stocks of sugar in excess of the quotas, it might well be held to be obnoxious to the Fifth Amendment as an arbitrary classification and a denial to owners of such sugar of equal protection of law. Heiner v. Donnan, 285 U.S. 312 (1932). This constitutional difficulty can be avoided only by excluding existing stocks of sugar from the purview of the Act.

It is therefore concluded, in view of the foregoing considerations, that the Secretary is limited under Section 8 a (1) (B) to forbidding the marketing, etc. of sugar produced during the calendar year in excess of the specified quotas.

QUESTION II

Under Section 8 a(1) (A) of the Act, may processors, etc. be forbidden from importing, etc. existing stocks of sugar produced from sugar-beets and/or sugar-cane grown in the Virgin Islands, Phillipine Islands, etc. or may the importation, etc. only of sugar manufactured from sugar beets and/or sugar-cane produced in those areas during the present marketing year be forbidden.

REPLY

Under Section 8 a (1) (A) the importation only of sugar produced in the marketing year in which the quotas apply may be prohibited where it is in excess of the quotas; hence no restriction may be put upon the importation or marketing of existing stocks of sugar already in continental United States or in the insular possessions.

DISCUSSION

The pertinent portion of Section 8 a (1) (A) provides as follows:

"(A) (1) Forbid processors, handlers of sugar, and others from importing sugar into continental United States for consumption, or which shall be consumed, therein, and/or from transporting to, receiving in, processing or marketing in, continental United States, and/or from processing in any area to which the provisions of this title with respect to sugar beets and sugarcane may be made applicable, for consumption in continental United States, sugar from the Virgin Islands, the Phillipine Islands, the Canal Zone, American Samoa, the Island of Guam, and from foreign countries, including Cuba, respectively, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year, based on average quantities therefrom * * * brought into or imported into continental United States * * *"

The history of this provision throws little light on the question here in issue since the wording remained identical throughout the various drafts of the Section until its final passage.

The difference in language between Sections 8 a (1) (B) (discussed above), and the instant provision raises, however, some difficulties in discovering the intention of Congress in this connection which were not present in Section 8 a (1) (B). It will be noted that while the latter provision refers to "sugar beets and/or sugarcane, produced in the continental United States * * * in excess of the following quotas, for any calendar year," Section 8 a (1) (A) refers to "sugar from the Virgin Islands, the Philippine Islands, etc. * * * in excess of quotas * * * for any calendar year * * *".

While the absence of the words "produced in * * * in excess of quotas * * * for any calendar year" in Section 8 a (1) (A) militates to some extent against an interpretation similar to that given above of Section 8 a (1) (B), it is submitted that more significant considerations compel the conclusion that this provision also forbids only the importation, processing and/or marketing of sugar manufactured from sugar beets and/or sugarcane produced in those areas in the marketing year in which the quotas obtain, and that the Section under discussion applies neither to stocks of sugar from these sources already in the United States nor to sugar grown previously to the establishment of the quota system and stored in the areas in question.

As in the case of Section 8 a (1) (B), the administrative interpretation of the provision under consideration supports the construction here suggested. Under Section I (4) - (12) and Section II (16) - (22) of the General Sugar Regulations, the entire amounts available under the quotas are allotted to sugar to be imported in the year in which the Act obtains. No reference is made to old stocks of sugar now on hand in the insular possessions, or to existing stocks of sugar from these sources now in continental United States. A Section representative of the ones cited above reads as follows:

"Processors, handlers of sugar, and others are hereby forbidden from importing sugar into continental United States for consumption therein * * * or receiving in continental United States * * * any sugar from Cuba in excess of the quota * * *."

Since the Regulations prohibit only the importation from these sources of sugar in excess of the given quotas, it was obviously the sense of the Department that the restrictions set up under the Act are inapplicable to insular sugar brought into continental United States prior to the passage of the Act. Indeed, any interpretation which would prohibit the marketing of this sugar would encounter the same constitutional difficulties as were pointed out above in reference to the placing of such restrictions on continental sugar produced

before the marketing year in which the quotas obtain.

Although the evidence in support of the view that sugar produced in years previous to those in which the quotas are in effect, and stored in the respective areas, does not come within the purview of the Act is not so clear, it is submitted that the sense of the entire Act supports this construction. It is obvious, from the whole tenor of the Bill, that it was the intention of Congress that sugar producers in the insular possessions be accorded the same general treatment as that given sugar growers in the continental areas. This is evident from the complete similarity of the system set up in the Act for both categories of producers. Consequently, it must have been the intention of Congress that the Act apply only to sugar grown in the years covered by the quotas established in the Bill.

It is accordingly concluded, on the basis of all the foregoing considerations, that the quotas apply only to sugar grown in the areas under discussion during the marketing years in which the quotas are in effect.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 90

FEDERAL TAX ON CHECKS UPON FUNDS OF
MARKET ADMINISTRATOR

It would appear that checks drawn by the Market Administrator upon the adjustment fund moneys obtained under the Indianapolis Milk License and deposited in a checking account are subject to the 2¢ federal tax on checks, but that checks drawn against other funds obtained under the license are exempt from the tax.

In view of the lack of authority on the construction of the term "public funds" as used in Treasury Regulations, it is however, recommended that the question be presented to the Treasury Department for a ruling thereon.

Opinion Section Memorandum No. 136
Dated July 24, 1934.

See, however, Ruling of Commissioner of Internal Revenue, dated September 18, 1934, in Appendix (A-7).

July 24, 1934.

MEMORANDUM TO MR. PRESSMAN

Pursuant to your request, I submit herewith an opinion upon the following:

QUESTION

Are checks drawn upon funds which are obtained under the Indianapolis Milk License and deposited in the Indiana National Bank subject to the two cents federal tax on checks?

ANALYSIS OF THE QUESTION

Under the facts set forth in the question it is not clear whether the Market Administrator or some other party draws the check against the funds obtained under the Indianapolis Milk License. However, the provisions of the license indicate that the Market Administrator draws the checks and the present memorandum is based on the correctness of this assumption. Moreover, under the milk license, the distributors are to deduct four cents per hundredweight from payments made producers and pay the same over to the Market Administrator. The moneys thus paid to the Market Administrator are to be used, in part, to meet administrative expenses. The remainder of the moneys is to be used for two purposes, namely: (1) a part is to be transferred by the Market Administrator to producers' cooperatives for the purpose of securing to members of such associations "market information, supervision of weights and tests, guarantees against failure of distributors to make payment for milk purchased and other similar benefits", (2) a part is to be used by the Market Administrator to secure to non-members of associations benefits similar to those provided by the associations for their members. In addition, the distributors are obligated under the license to make payments to the adjustment fund maintained under the direction of the Market Administrator. The question as presented does not disclose to which of the above funds reference is made. It is, however, important that the distinctions be kept clear.

OPINION

I am of the opinion that checks drawn by the Market Administrator against the adjustment fund moneys are subject to the federal tax, but that checks drawn against

other funds obtained under the Indianapolis Milk License are exempt from the tax. Due to the lack of authority construing the term "public funds" as used in the Treasury regulations, it is, however, recommended that the question be presented to the Treasury Department for a ruling thereon.

Pertinent Statutes, Treasury Regulations and Decisions.

Section 751 (a) of the Revenue Act of 1932 provides:

"There is hereby imposed a tax of 2 cents upon each of the following instruments, presented for payment on or after the 15th day after the date of the enactment of this Act and before July 1, 1934: Checks, drafts, or orders for the payment of money, drawn upon any bank, banker, or trust company; such tax to be paid by the maker or drawer."

Section 212 of the National Industrial Recovery Act amended the Revenue Act of 1932 by striking out "1934" wherever appearing therein and by inserting in lieu thereof "1935".

Regulation 42, article 36 promulgated June 17, 1932 by the Treasury Department (as amended by T.D. 4344, dated July 29, 1932) provided:

"The checks, drafts, or orders drawn by officers of the United States or of a state, county, or municipality, or of a foreign government, in their official capacities, against public funds standing to their official credit and in furtherance of duties imposed upon them by law, are not subject to the tax."

Under the above regulation, the Treasury Department ruled that funds for the support of a National Guard Unit, furnished by the Federal Government or by a State, or both are not subject to the tax, but that funds contributed by local organizations, for the support of the unit are subject to the tax (S.T. 546; C.B. Dec. 1932, p. 538). The Treasury Department also ruled that checks issued by and charged against company funds of the Civilian Conservation Corps are not subject to the tax. (S.T. 694; C.B. 1933). The ruling took note of the fact that the accounts against which the checks are charged consist wholly of appropriated moneys and that the corps is a governmental agency insofar as its public and governmental functions are concerned.

The eighth paragraph of Article 36, Regulations 42 of the

Treasury Department was amended by T.D. 4396, dated October 9, 1933, to read as follows:

"Checks, drafts, or orders drawn against public funds by officers of the United States are not subject to the tax. Checks, drafts, or orders drawn against public funds by officers of a State or political subdivision thereof are not subject to the tax where drawn in connection with the exercise of an essential governmental function. The term "public funds" as here used includes funds on deposit for the benefit of the public."

Seemingly, there have been no judicial decisions or Treasury Department ruling on the Treasury regulation in question since the issuance of T.D. 4396. However, it is clear that checks are exempt from the federal tax if two requirements are fulfilled, namely, (1) the checks are drawn by "officers of the United States", (2) the checks are drawn against "public funds".

1. The Market Administrator is an officer of the United States.

That the Market Administrator is an "officer of the United States" appears unquestionable. He is appointed by the Secretary of Agriculture, authority for such appointment being provided by Section 10 (2) of the Act. His appointment, being made by the head of a department under express statutory authority, conforms to one of his methods provided by the constitution for the appointment of an inferior officer. Const., Art. II, Section 2 - That the administrator is an "officer" rather than an employee is shown by the fact that his employment, although not for a fixed term, is of a continuing nature, not limited by contract. See, U. S. v. Hartwell, 6 Wall. 385 (1867). Moreover, the fact that the administrator is responsible for the performance of the duties prescribed for him in the license leads to the conclusion that his status is that of an officer rather than that of a mere employee of the government. See 31 Op. Atty. Gen. 201, 204 (1918). Finally, it should be noted that the Market Administrator is required to execute and deliver to the Secretary a bond conditioned upon the faithful performance of his duties.

2. I am of the opinion that the moneys which are payable under the license to the adjustment fund are not "public funds" within the Treasury regulations, but that the other moneys payable by licensees to the Market Administrator constitute "public funds."

Two obstacles make difficult a decision on the question whether the funds referred to in the question constitute "public funds" within the meaning of the Treasury Department regulations. In the

first place, the question as presented does not indicate to which of the moneys obtained under the license reference is made. This point was discussed more fully supra. Secondly, there is a lack of authority construing the term "public funds" as used in the Treasury regulations, as amended by T. D. 4396. It is thus impossible to ascertain definitely the meaning of the following sentence contained in T. D. 4396:

"The term "public funds" as here used includes funds on deposit for the benefit of the public."

A liberal interpretation of the above-quoted provision would permit all funds obtained under the milk license to be included within the term "public funds", since the whole scheme envisaged by the license is for the general "benefit of the public" and therefore the moneys would be on deposit for the benefit of the public. I am doubtful, however, concerning the extent to which the term "public funds" is broadened by the provision in T.D. 4396.

The moneys paid to the Market Administrator to meet administrative expenses seemingly constitute "public funds". They are payments in the nature of involuntary contributions, exacted under public authority, and to be used for purposes of a public nature. I am likewise of the opinion that the moneys used for the purpose of securing to licensees such benefits as "market information, supervision of weights and tests etc." are within the meaning of the term "public funds" as used in the Treasury regulations. Note should again be taken of the involuntary character of the payments and that they are exacted under authority of law.

Persuasive to this view is the ruling of the Comptroller General, that funds paid to and received by the Interstate Commerce Commission as excess railway operating income under section 15 a of the Transportation Act of 1920, 41 Stat. 489, are "public moneys" in the sense that they should be covered into the Treasury of the United States. 2 Dec. Comp. Gen. 360 (1922). The moneys obtained under the Act involved above were used by the Commission either in making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers. In making his ruling, the Comptroller General took issue with an opinion of the Attorney General (33 Op. Atty. Gen. 316) to the effect that the moneys were not "public moneys". The Attorney General based his conclusion upon the ground that the Government of the United States possessed no beneficial interest whatever in the funds, which were to be held by the commission solely for the purposes prescribed by the statute. Note should likewise be taken of the decision of the Comptroller General that funds collected by the Federal Reserve Board by assessments on Federal reserve banks are public funds. 3 Dec. Comp. Gen. 190 (1923), 468 (1924). The close analogy

between such assessments and the deductions from producers for administrative expenses is apparent when it is recalled that the primary purpose of the assessments on the Federal reserve banks is to pay the expenses and salaries of members of the Federal Reserve Board.

As to the moneys payable to the equalization pool or adjustment fund, I believe a different rule is applicable. The adjustment fund scheme is merely a means whereby a blended price may be paid producers. The Market Administrator has no control over the use of the money payable into the adjustment fund, but must transfer the funds immediately to the proper recipients. See Smyer v. U. S., 273 U. S. 333 (1927), holding that moneys collected by postmasters upon the delivery of C.O.D. parcels are not "public moneys" within the meaning of that term in an official bond.

The construction above placed upon the term "public funds" is obviously subject to error in view of the absence of authority construing the term as used in the Treasury Regulations 42, Article 36, as amended by T.D. 4396. That a narrow construction will be given the term "public funds", as used in Treasury regulations, is a possibility. It is therefore recommended that the question be presented to the Treasury Department for a ruling thereon. Moreover, it is doubtful whether the Indiana National Bank will refund the amounts already charged without a ruling from that Department.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of General Counsel.

No. 21

LEGALITY OF ADVERTISING METHODS UNDER
OMAHA MILK LICENSE

The practice of a milk distributor, licensed under the Omaha-Council Bluffs Milk License, of paying for that part of the advertisement of certain stores which is used to advertise the distributor's products, cannot be said to violate the terms of paragraph 4 of Exhibit C unless it can be shown that the free service which he renders will bring the price he charges for milk below the minimum price fixed by the license.

Opinion Section Memorandum No. 133
Dated July 25, 1934.

July 25, 1934.

MEMORANDUM TO MR. N. J. CLADAKIS,
Field Investigation Section.

QUESTION

You have inquired about the matter of the Roberts Dairy Company in Omaha, Nebraska, and the legality of their practice of paying for that part of the advertisement of the Hinky Dinky stores which is used to advertise the Dairy's products.

OPINION

From the information given us one cannot say that the Roberts Dairy Company has violated paragraph 4 of Exhibit C of the Omaha - Council Bluffs Milk License by this practice of paying for the advertisement of its customers.

DISCUSSION

Paragraph 4 of Exhibit C provides as follows:

"No distributor, or its officers, employees, or agents, shall employ any method or device whereby any article is sold or offered for sale at below the foregoing minimum prices, whether by discount rebate, redeemable certificate, stamps or tickets, free service or merchandise credit for articles returned, loans or credit outside the usual course of business, or combining prices for such articles together with another commodity sold, or by subsidy given for business or assistance in procuring business."

Before any distributor can be said to violate this paragraph it must be shown that the free service which he renders will bring the price he charges below the minimum. In the latter part of the file given me which Mr. Robert C. Davenport sent to Mr. Geo. R. Wicker, it is stated that the Roberts Dairy Company is selling its milk at a whole-sale price of 7¢ a quart, which is half a cent more per quart than

required by the License. It is also stated in this letter that the sales of the Company to the Hinky Dinky stores amount to approximately 54 cases daily. Therefore it must first be shown that the extra price of $1/2\phi$ multiplied by the number of quarts in 54 cases is less than the cost of the advertisement which the Roberts Dairy Company pays for. If the Roberts Dairy Company does not place its advertisement daily but for example weekly, then it must be shown that the advertisement in question costs more than $1/2\phi$ times the number of quarts purchased weekly by the Hinky Dinky stores.

If the facts set forth in the foregoing paragraph are shown to be true, then a violation of Paragraph 4 of Exhibit C of the License may perhaps be made out. That paragraph prohibits the use of any device for selling milk below the minimum price "by subsidy given for business or assistance in procuring business". This does not, of course, prohibit all payments to a purchaser for assistance in procuring business; the subsidy must constitute a device whereby "an article is sold or offered for sale at below the * * * minimum prices". Where the distributor receives full and fair value for a payment made for "assistance in procuring business", there is no sale below the minimum price if the milk itself is not sold below the minimum price. But here it appears that the distributor is paying the full cost of an advertisement from which it reaps only part of the benefit. Since the full cost of the advertisement is paid by the distributor, there is a subsidy to the Hinky Dinky stores to the extent that the advertisement benefits them. It is difficult, if not impossible, to prorate the benefit of the advertisement as between the distributor and the store. Fortunately, there is no necessity at this time to make an attempt, since, as indicated above, there is no evidence that even the full cost of the advertisement exceeds the differential between the sale price of the milk and the minimum figure permissible under the License.

I advise you, accordingly, that, upon the evidence presented to me, it cannot be determined that the License is being violated.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 92

PRODUCTION CONTROL ASSOCIATIONS NOT
SUBJECT TO STATE COMPENSATION LAWS

County Production Control Associations, organized pursuant to the Agricultural Adjustment Act, are Federal instrumentalities and are not subject to the Workmen's Compensation Law of the State of Idaho.

Opinion Section Memorandum No. 139
Dated July 25, 1934.

July 25, 1934.

MEMORANDUM TO MR. GEORGE E. FARRELL

Pursuant to your request, I submit herewith an opinion upon the following:

QUESTION

Are the Wheat Production Control Associations in Idaho, organized pursuant to the Agricultural Adjustment Act, subject to the state Workmen's Compensation Law?

OPINION

The Wheat Production Control Associations are Federal instrumentalities and are, therefore, not subject to the Workmen's Compensation Law of Idaho.

I.

The Wheat Production Control Associations in Idaho, organized pursuant to the Agricultural Adjustment Act, are Federal instrumentalities.

The wheat production control associations are set up pursuant to the Agricultural Adjustment Act for the purpose of cooperating with the Secretary of Agriculture in making effective the provisions of the Act. Authority for their establishment is found in section 10 (b) of the Act which makes the following provision:

"(b) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this title, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of rental or benefit payments."
(Underscoring supplied)

That the associations are Federal instrumentalities is made clear by Section 1, Article II of the Articles of Association of the various wheat production control associations, which provides:

"SECTION 1. The Association is organized for the purpose of cooperating with the Secretary of Agriculture in making effective the provisions of the Agricultural Adjustment Act, approved May 12, 1933, as amended (hereinafter referred to as the "Act"), in their application to wheat and for no other purpose.

"It shall operate under the general supervision and direction of the Wheat Section, Production Division, of the Agricultural Adjustment Administration, or its Regional Branch (hereinafter jointly referred to as the "Wheat Section"), and, upon approval by or on behalf of the Secretary of Agriculture, shall be the agency within the above-named County or Counties (hereinafter referred to as the "County") for the administration of the Agricultural Adjustment Act in relation to the production of wheat. There shall be only one such Association in or for any County, but two or more Counties may set up a joint Association, as provided hereinafter.

"It is a fundamental principle of the organization of the Association that the Secretary of Agriculture may, in his sole discretion, at any time when it shall appear to him that the conduct of the Association or its further existence is not furthering the purpose or intent of the Act or that the Association is no longer necessary to effectuate the declared policy of the Act, withdraw his approval, whereupon the Association shall cease to exist. The provisions of these Articles shall be subject to all regulations, applicable thereto, heretofore or hereafter prescribed by the Secretary of Agriculture."

It is seen from the above that the Associations are organized for the sole purpose of cooperating with the Secretary of Agriculture to carry out the provisions of the Agricultural Adjustment Act. The Associations have no power to take any action until the Articles of Association and the Associations themselves have been approved by or on behalf of the Secretary of Agriculture. Moreover, the Associations are under the direction and supervision of the Wheat Section, Production Division, of the Agricultural Adjustment Administration and are subject to the regulations issued by the Secretary of Agriculture. Finally, the Associations cease to exist whenever the Secretary, in his sole discretion,

decides that they are no longer necessary to effectuate the declared policy of the Act. That the associations are under these circumstances federal agencies or instrumentalities is indicated by the judicial decisions defining the scope of the term "federal instrumentality." Thus, the court in Clallam County v. U.S., 263 U.S. 341 (1923), in holding the United States Spruce Corporation an instrumentality of the federal government laid emphasis on the fact that it was formed pursuant to statutory authorization, that it was organized for the sole purpose of aiding the Government in carrying on the war and that it was to be dissolved at the termination of the war. Likewise, the court in holding the Emergency Fleet Corporation a federal instrumentality noted that an Act of Congress conferred the authority on the United States Shipping Board to form the corporation in contemplation of the possibility of a war, and emphasis was again placed on the fact that the corporation was to be dissolved within a specific time after the war had come to an end. See also North Dakota-Montana Wheat Growers Association v. U.S., 66 Fed. (2d) 573 (1933), wherein the Federal Farm Board was held to be a government instrumentality since it was formed for the sole purpose of aiding the Government in carrying out its agricultural program. In like manner the Wheat Production Control Associations are formed pursuant to statutory authority, they are subject to the direct control of the Secretary of Agriculture and are to be dissolved whenever the Secretary determines they are no longer necessary to the effectuation of the agricultural program set forth in the Agricultural Adjustment Act.

II.

The provisions of the Workmen's Compensation Laws of Idaho indicate that it was not intended that they should apply to federal instrumentalities.

Section 901, Chapter 9, title 43, of the Idaho Code provides "This Act shall apply to all public employment as defined in Section 43-903 and to all private employment not expressly excepted by the provisions of Section 43-904." In defining the term "public employment", Section 43-903 of the Code provides "this Act shall apply to employees and officials of the state and all counties, cities, cities under special charter or commission form of government, villages, school districts, irrigation districts, drainage districts, highway districts, road districts, and other public and municipal corporations within the state * * *". From the Code provisions, it seems that it was not within the contemplation of the Legislature of Idaho to attempt to make the Workmen's Compensation Laws applicable to the employees of an instrumentality of the United States. Moreover, it is possible that the state compensation statutes would not be applicable to the wheat associations, even though they were held to be private organizations. This is true since Section 43-903 of the Code specifically provides that "none of the provisions of this Act shall apply to employment which is not carried on by the employer for the sake of pecuniary gain."

III.

Since the Wheat Production Control Associations are Federal Instrumentalities, they are not subject to the Workmen's Compensation Law of Idaho even if the statute be construed as including Federal instrumentalities within its provisions.

The question presented for my consideration does not make reference to specific provisions of the Idaho Workmen's Compensation Laws. A brief review of the provisions of that Act will therefore be made to ascertain the extent to which the application of the provisions to the Wheat Production Control Associations would affect the functioning of such associations. Sections 43-1101, 43-1110, 43-1112, 43-1113 of the Idaho Code set forth the provisions dealing with the amount of the payments to be made by employers for death or injury to employees while in their service. Section 43-1114 requires employers to make additional payments to an industrial indemnity fund to be maintained by the state treasurer. Section 43-1301 provides for the establishment of an Industrial Accident Board and Section 43-1601 makes it obligatory on each employer, subject to the provisions of the Act, to furnish bond or other security to the Industrial Accident Board to guarantee that payment will be made to disabled employees. Finally, Sections 43-1801, 43-1802 and 43-1803 make provision as to reports which are to be made by employers to the Board. It is clear that if the provisions of the Workmen's Compensation Law pertaining to the making of reports, the posting of security satisfactory to the Board and in case of injury to employees the making of payments to such injured parties are held applicable to the Wheat Production Control Associations the functioning of such associations will be materially hampered.

It is a well-established general principle that Federal instrumentalities are not subject to State Laws. The court in Johnson v. Maryland, 254 U.S. 51 (1920), in ruling that a Maryland statute, penalizing those who operate motor trucks on highways without having obtained licenses based on examination of competency and payment of a fee, cannot constitutionally apply to an employee of the Post Office Department while engaged in driving a Government truck over a post road in the performance of his official duty, stated the rule in the following words:

"Here the question is whether the State can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and indiscriminating, the State's inability to interfere has been regarded as established since McCulloch v. Maryland, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States

to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today. Farmers & Mechanics Savings Bank v. Minnesota, 232 U.S. 516, 525, 526."
(Underscoring supplied) (p. 55)

The judicial decisions applying the general rule to a specific factual situation are persuasive to the effect that the wheat associations are not subject to the laws of Idaho. Inasmuch as the bulk of the cases involving state regulations and Federal instrumentalities deal with taxation, these cases will be considered first. Thus in the case of Clallam County v. United States, 263 U.S. 341 (1923), the court held that a state was without power to tax the property of the United States Spruce Production Corporation, inasmuch as the latter was a Federal instrumentality. This decision was made notwithstanding the fact that the corporation involved had been incorporated under the laws of Washington, the state attempting to levy the tax. For other cases holding that Federal agencies and instrumentalities are free from state taxation, see McCulloch v. Maryland, 4 Wheat. 316 (1819); State of Alabama v. United States, 38 Fed. (2d) 897 (1930). The extent to which this doctrine has been carried is well illustrated by the case of Panhandle Oil Co. v. Knox, 277 U.S. 218 (1928). The court therein held that a Mississippi State tax imposed on dealers in gasoline for the privilege of selling, and measured at so many cents per gallon of gasoline sold, was void under the Federal Constitution as applied to sales to instrumentalities of the United States, such as the Coast Guard Fleet and Veterans' hospitals. Inasmuch as taxation is regarded as an especially vital function of the State government, the fact that the Federal instrumentality doctrine has been rigorously applied in this field of state activity is conducive to the conclusion that an equally strict application will be made where the Workmen's Compensation Laws of the state are involved. The cases involving attempted state taxation of Federal instrumentalities should not, however, be dismissed without reference being made to the statement of the court in Educational Films Corp. v. Ward, 282 U. S. 379 (1931) to the effect that

"This Court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our Constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those

affairs committed to it by the Constitution, without undue interference by the other. McCulloch v. Maryland, *supra*, p. 405; The Collector v. Day, 111 Wall, 113, 125; Railroad Co. v. Peniston, 18 Wall. 5, 31; South Carolina v. United States, 199 U.S. 437, 461; Flint v. Stone Tracy Co., *supra*, pp. 154, 172; Metcalf & Eddy v. Mitchell, *supra*, pp 523, 524." (p. 391)

See also, Fox Film Corp. v. Doyal, 286 U.S. 123 (1931); Willcuts v. Dunn, 282 U.S. 216 (1931) for judicial decisions indicating this new tenor on the part of the Supreme Court in regard to Federal instrumentalities and state regulation.

There thus exists the possibility that the court will hereafter go into the facts and ascertain the degree to which a state regulation interferes with the functioning of the Federal instrumentality. However it should be noted that in the cases manifesting the new attitude towards the Federal instrumentality doctrine, there existed no direct tax on the exercise of the governmental functions. For example, in the Educational Films case the court held that royalties from United States copyrights may be included in the income which is the measure of the New York Corporate Franchise Tax. In the Fox Film Corp. case, it was held that the mere fact that a copyright is property derived from a grant by the United States is insufficient to support the claim of exemption of income from the copyrights from state taxation. Note should also be taken that in two recent decisions the Supreme Court apparently reverted to the traditional view that governmental agencies have an absolute immunity. Indian Motorcycle Co. v. U.S. 283 U.S. 570 (1931); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932).

The application of the general rule regarding Federal instrumentalities is not limited to cases involving taxation. Ex Parte Villman, 277 Fed. 819 (1921) concerned an Ohio statute providing that headlights on all trucks must be visible ahead 200 feet and 10 feet on each side. The headlights on a mail truck conformed to the regulations of the Post Office Department, but not to that of the Ohio law. The court held that the Ohio state laws were inapplicable. In the case of United States v. Stewart, 47 Fed. (2d) 979 (1931) the court held that the national census was exclusively within the authority of Congress and that, therefore, the Director of the Census was not subject to the control of the State law. Mandamus, therefore, could not be properly issued against the Director of Census when he decided to state the facts concerning the population of Atlanta, Georgia, in greater detail than the State of Georgia cared for. The Director had decided to list separately various unincorporated communities of which the Georgia Legislature had decided to make one municipality. The action of the State Legislature was held to have no operative effect in the situation. In Ohio v. Thomas, 173 U.S. 276, (1898), it was held that the Governor of a National Soldiers' Home in Ohio could not be prosecuted, under a state statute regulating the use of oleomargarine, for including this article in the supplies used in the Home.

The immunity of Federal agents from state criminal process was established in the case of in re Neagle, 135 U.S. 1, (1889), where state enforcement of its homicide laws was held constitutionally inapplicable to a United States Marshall who had sought to protect a representative of the United States judiciary from imminent danger. To the effect that the criminal laws of a state are not applicable to a party acting under the laws of the United States, see also in re Waite, 81 Fed. 359 (1897), in re Loney, 134 U. S. 372.

The above cases are indicative of the extent to which the courts go in holding Federal instrumentalities free from State regulatory measures. If the important state taxing and police powers may not be exerted over Federal instrumentalities because of the supremacy of the Federal Government in the field of its constitutional authority, I am of the opinion that for the same reason the state is forbidden to exert a regulatory control over the Wheat Production Control Associations by means of its Workmen's Compensation law.

Even if the courts adopt the attitude indicated in the Educational Films case and consider the degree of the interference with the Federal instrumentality, it may yet with reasonable assurance be declared that the Associations are exempt in the present instance. It has been pointed out supra that the Idaho statute requires employers to make reports to the Industrial Accident Board, post security satisfactory to the Board, and make payment to injured employees. I am of the opinion that a court will be reluctant to permit a state regulation to hamper in this manner the functioning of Federal instrumentalities. Moreover, as the Associations derive their funds from deductions from payments made to producers under the wheat contracts, a state law requiring the Associations to make payments to injured employees would serve to limit the benefits derived by wheat growers under the contracts. A court in holding the Idaho Workmen's Compensation Law inapplicable to Wheat Production Control Associations therefore is not only protecting Federal instrumentalities from a state regulatory measure, but is likewise aiding in the effectuation of the governmental program set forth in the Agricultural Adjustment Act.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
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No. 93

TERMINATION OF MARKETING AGREEMENT FOR
SOUTHERN RICE MILLING INDUSTRY ---
REFUND TO CONTROL COMMITTEE

The Marketing Agreement for the Southern Rice Milling Industry is subject to an implied promise by the Secretary to repay to the Control Committee advances made under Section (6) of Article VIII, notwithstanding the possible termination of the Agreement before the establishment of the producers' trust fund provided for in Article VIII.

July 25, 1934.

MEMORANDUM TO MR. PRESSMAN

This is in reply to your memorandum supplementing Mr. Howe's request for an opinion on the probable legal effect of terminating the Southern Rice Agreement in which you request advice upon the repayment of the sums advanced to the Secretary by the Control Committee.

QUESTION

If the Marketing Agreement for the Southern Rice Milling Industry is immediately terminated, may the Secretary refund to the Control Committee the advance made for expenses in initiating the crop control program?

OPINION

Yes; the Agreement is subject to an implied promise to repay the Control Committee, notwithstanding possible termination of the Agreement before the establishment of the trust fund.

STATEMENT OF FACTS

Section 6 of Article VIII of the Marketing Agreement provides:

"Advances and Surplus Funds. If funds are required for expenses in initiating any such crop control program before sufficient payments have been made into the trust fund, the Control Committee shall advance such required funds to the Secretary out of the Marketing Fund. Such advances shall be repaid to the Control Committee by the Secretary from the trust fund before payment therefrom of any benefit payments to Producers. Any moneys remaining in the trust fund at the end of any crop year, after all proper payments to Producers have been made and all expenses paid, shall be used and/or distributed as the Secretary shall determine to effectuate the purposes of the Act."

Pursuant to this section, the Secretary by letter dated March 14, 1974, requested the secretary of the Control Committee to advance out of the Market Fund the sum of \$55,765, and stated:

"It is hereby agreed that in the event a lack of cooperation on the part of producers results in a failure of the rice crop control program, the unexpended balance of an advance made under section 6, supra, will be refunded to the Control Committee."

The amount requested was paid by check to the order of the Treasurer of the United States and deposited with the Treasurer in a contributed funds account under the title "66.2-193 Rice Millers' Reimbursement Fund, Agricultural Adjustment Administration," and later transferred to the Extension Service under the contributed funds title "66.2-10, Rice Millers Reimbursement Fund."

DISCUSSION

The effect of termination of the Agreement, pursuant to Article XIII, before the setting up of a trust fund is not dealt with except by the language of Article XIV which provides:

"Duration of Immunities

The benefits, privileges, and immunities conferred by virtue of this Agreement shall cease upon its termination, except with respect to acts done prior thereto; and the benefits, privileges and immunities conferred by this Agreement upon any party signatory hereto shall cease upon its termination as to such party except with respect to acts done prior thereto."

It may be conceded that these provisions, general as they are, would be effective to preserve any benefit, privilege or immunity enjoyed by any miller, or by the Control Committee, with respect to advances already made to the Secretary. Nevertheless, if the obligation of the Secretary to reimburse the Control Committee is conditional upon the setting up of the trust fund, and this condition can never be fulfilled, owing to the termination of the Agreement, the millers and the Control Committee may well be left without a valid claim to any repayment. Such a result would flow from the terms of the contract itself, and would therefore properly be regarded as within the contemplation of the parties in making the Agreement. If, however, the obligation of the Secretary to repay is not conditioned upon the setting up of the trust fund, then the termination of the Agreement will not necessarily cut off the rights of the millers and Control Committee to reimbursement.

Before entering into a consideration of the terms of the Agreement, express or implied, as to repayment, the character of the payment itself may be briefly examined. In the first place, it is denominated an "advance", not only in Article VIII but in Article VII, Section 4, which sets forth the purposes for which the Marketing Fund may be used.

That it is so denominated is sufficient, in the absence of ambiguous or conflicting terminology pointing to a different interpretation, to stamp its character as that of a loan. The purpose for which it is made is to meet the initial expenses of a crop control program undertaken for the benefit of producers. The making of the advance and the institution of the control program do not serve to discharge any duty resting upon the millers, and are certainly not in the nature of an investment in which the possibility of increased returns provides the inducement for the venture of funds.

The only express provision relating to repayment is contained in Article VI, Section 8, and reads as follows:

"Such advances shall be repaid to the Control Committee by the Secretary from the trust fund before payment therefrom of any benefit payments to producers."

While it is provided that the advances shall be repaid from the trust fund, it is not provided that they shall be paid only from such fund or that the setting up of the fund shall be a condition precedent of repayment. The repayments are to be made "before payment therefrom of any benefit payments to producers." They are thus in the nature of a charge upon the trust fund, and the provision acts as a limitation upon the use of that fund for benefit payments to producers. The requirement that the advances be repaid before benefits are paid to producers is clearly designed to protect the Control Committee, giving them an interest in the fund as security, and in effect setting a time for repayment, since the benefit payments to producers are to be made "by the end of the crop year." This entire provision may be viewed as an arrangement of a normal business character by which a fund to be used for certain purposes is made subject to a charge in favor of those who have advanced money to it by way of accommodation.

To interpret the provision for repayment from the trust fund as exclusive requires the conclusion that the Control Committee's right to the repayment of an advance is subject to forfeiture upon the exercise of an arbitrary right of termination by the other party to the contract, to whom the funds were advanced. While the parties to a contract are not to be protected from their own bad judgment as expressed in the provisions of a contract, a contract is always to be interpreted, so far as its terms permit, in favor of a just and reasonable operation, consistent with the apparent intent. Forfeitures, particularly, are not favored, and will not be enforced unless the intent of the parties to provide for them is clearly evident in the contract. It has been held that under an insurance contract revocable at the pleasure of either party, without condition expressed, a penalty of forfeiture cannot be enforced against either party making the revocation. Nurney v. Fireman's Fund Ins. Co., 63 Mich. 673, 30 N.W. 350 (1886). Still less, it would seem, should the exercise of a right of revocation by one party work a forfeiture as to the other. Furthermore, the well established rule that contracts are to be taken most strongly against the party making the instrument would apply here to the claim of the Control Committee for repayment. The fact that the claim of the Control Committee is against the government does not take the case out of the rule. See Garrison v. U.S., 74 (7 Wall.) U.S. 688, 690 (1869); Marietta Mfg. Co. v. U.S., 73 Ct. Cl.

528, 546 (1932).

It may be noted that the Secretary in his letter dated March 14 to the Secretary of the Control Committee "agreed" that if the rice crop control program should fail because of a lack of cooperation on the part of producers the unexpended balance of the advance should be refunded. It is true that his statement applies only to the unexpended balance. Nevertheless, this agreement (which may perhaps be viewed as an administrative interpretation) is at variance with the position that repayment is to be made exclusively from the trust fund. It indicates that the parties had failed to provide expressly for repayment of the advance in the event of failure of the control program, just as there has been a failure to provide expressly for repayment in the event of termination of the Agreement. As to the possible effect of subsequent communications between the parties such as the Secretary's letter of March 14, I am not in a position to judge without more complete information.

It is, however, my opinion that the Agreement as originally approved must be interpreted as containing an implied promise on the part of the Secretary to repay the advance made by the Control Committee, irrespective of whether or not the trust fund is established or the Agreement terminated. The provisions of Article XIV preserving benefits and privileges with respect to acts done prior to termination, while not necessary to this conclusion, are, however, consistent therewith since it plainly indicates that termination was not intended to expose the parties to penalties or forfeitures as to past actions.

It is further my opinion that the Secretary had authority to promise to repay the advance. The money paid was for use in initiating a crop control program, and has been expended in organizing and conducting the work of local committees and in ways similar to those entailed in initiating other crop control programs. Such expenses are "administrative expenses" within the meaning of Section 12 (c) of the Agricultural Adjustment Act, and the appropriations made under the Act are therefore available for such purposes. See Op. Sect. Mem. No. 1. In the present case these expenses have been met initially from the advance made by the Control Committee. The repayment to the Committee from appropriations available to the Secretary would appear to be none the less an administrative expense because in the nature of a refund of money already advanced to meet administrative needs, subject to an implied promise of repayment.

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No. 97

MEANING OF "ACCREDITED GENERAL SALES AGENT"

The term "accredited general sales agent," as used in Article IV, Section 6 of the Cling Peach Marketing Agreement and License, should not be construed as including an agent who sells a canner's entire output.

Opinion Section Memorandum No. 140
Dated July 26, 1934.

July 26, 1934

MEMORANDUM TO MR. PRESSMAN

With reference to the memorandum of Mr. Wellman Chief of the General Crops Section, to you, dated March 23, 1934, requesting a legal opinion concerning the interpretation of the term "Accredited General Sales Agent", I submit the following:

QUESTION

What is the meaning of the term "Accredited General Sales Agent", as used in Article IV, Section 6 of the Cling Peach Marketing Agreement and License? Is it to be construed as meaning an agent who sells a canner's entire output?

OPINION

It seems that the term as used in the Marketing Agreement and the License in question is not to be construed as referring to a canner's sole agent.

DISCUSSION

The term "general", when used in connection with an "agent", correctly and accurately refers only to his authority to perform a number of acts, or to his continuity of service. The term is used in distinction to the word "special", - a "special" agent is one authorized to perform "a single and particular act only". Mechan Agency, Sect. 59, (2d Ed., 1914).

"The distinction between a general and special agency is in most cases a plain one. The purpose of the latter is a single transaction, or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency, but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency.

* * * The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only." Butler v. Maples, 76 U.S. 766 (1869), at p. 773.

The term "general agent" also is said to have a "subordinate" meaning. It is sometimes taken to refer to the extent of the agent's authority. The phrase, as distinguished from that of "special agent" would connote the distinction between an agent invested with broad powers, and one having only limited powers. Mechem, supra, Sect. 59. But this use of the term "general agent" as a basis of distinction from the "special agent" is not the accepted one. The most recent authoritative definition of these terms also makes the continuity of service the true basis.

"(1) A general agent is an agent authorized to conduct a series of transactions involving a continuity of service.

"(2) A special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service." American Law Institute, Restatement of the Law of Agency (1933) Sect. 3.

The reason why these terms are the subject of any such confusion is that very often the agent having power to perform a series of similar acts, also is invested with broad powers with which to perform them, whereas an agent authorized to perform a particular act is entrusted only with limited powers. Mechem, supra, Sect. 59. But true "general" agents may have only limited powers with which to effect their series of transactions, and the "special agent" may, on the other hand, be invested with broad powers with which to perform his individual transaction or acts. American Law Institute, supra, Sect. 3 (c).

However, regardless of which of the above meanings of the term is adopted, neither of them expresses the idea of the Control Committee, a "one who is employed to handle all, or substantially all, of a canner's sales, or any particular class thereof, such as domestic or export."

There are, of course, "sole" agents. See Stone v. Fox Machine Co., 145 Mich. 689, 109 N.W. 659 (1906). And, "exclusive" agents. See Harnes Automobile Co. v. Woodill Auto Co., 163 Cal. 102, 124 Pac. 717 (1912). And, "sole and exclusive" agents. Wiggin v. Consolidated Adjustable Shoe Co., 161 Mass. 597, 37 N.E. 752 (1894). Those are the terms employed in agency law to correctly connote the kind of an agent the Control Committee has in mind. Otherwise, a principal may have several general agents. Insurance Co. of North America v. Thornton, 130 Ala. 222, 30 So. 314 (1909); See Maddox Motor Co. v. Ford Motor Co., 23 S.W. (2d) 333 (Comm. of App. Tex. 1930).

"And it is not the less a general agency, because it does not extend over the whole business of the principal. A man may have many general agents - one to buy cotton, another to buy wheat, and another to buy horses. So, he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood." Butler v. Maples, 76 U.S. 766 (1869), at page 773.

That the agent is a "sales" agent in no way affects the accepted meaning of the term "general" agent. A "general sales agent" is one who, under one blanket authorization is empowered to continuously make sales in behalf of a principal. See Hochem, supra, Sect. 854, et seq. But the "general sales agent" may, of course, also be a "sole" agent. See Kaempfer v. Tompkins Co., 242 N.Y. 376, 152 N.E. 120 (1926). Or, an "exclusive" one. See Drake v. Sherwood, 41 Minn. 535, 43 N.W. 560 (1889). Or, the sole agent for the sale of the total output of the principal. Hutchinson v. Root, 2 App. Div. 584, 38 N. Y. Sup. 16, aff'd 158 N.Y. 681, 52 N.E. 1124 (1896). Such would seem to be the kind of agent the Control Committee has in mind.

Thus, it seems clear that there is nothing in a "sales" agency which would serve to change the orthodox meaning of the term "general", when applied to an "agent". Other descriptive terms would have to be used to convey the idea which the Control Committee contends is herein conveyed by the term "general sales agent." Of course, it would seem very probable that an agent of the kind described by the Control Committee would be a "general agent." But this is far from saying that a "general agent" is the kind of an agent described by the Committee. He would have to be much more than a mere "general sales agent," as that term is used in the law of agency.

Nor does the use of the term "accredited" aid in sustaining the Control Committee's definition. To accredit is only to "furnish with credentials." Funk & Wagnalls New Standard Dictionary. Nor does the term take on any different meaning when used in connection with an agent. See Rorick vs. Stillwell, 101 Fla. 4, 133 So. 609, 615 (1931). Any kind of an agent may be "accredited." American Law Inst. Restatement, Sect. 128. Problems arising out of the word "accredited" when used in connection with an agent, are principally limited to the "specially accredited" agent. The type of problems thus arising are illustrated by the following quotation:

"An agent is specially accredited to a third person when such third person has been specially invited by the principal to deal with the agent under such circumstances as lead him reasonably to believe that he will be notified if the authority is altered or revoked. The principal in person may specially accredit the agent to a third person or he may do so through the agent specially accredited or through another agent. It is not enough, however, that the principal has cards made upon which the agent's name is printed, indicating that he is an agent or that the principal directs the agent to say that he is instructed to call upon the third person. In order that an agent may be specially accredited, there must be some assurance given to the particular third person other than that which ordinarily exists in the case of persons who know that a certain person is an agent. Either a general or a special agent may be specially accredited." American Law Institute, Restatements, Sect. 128.

Obviously, neither the use of the simple term "accredited", nor the special problems arising out of the more technical term "specially accredited", serve to affect the ordinary meaning of the phrase, "general agent" or "general sales agent".

It is true that the above definitions cannot be inflexible.

"The general principles of the law of agency are well defined, and the courts are agreed respecting their scope and application. The only difference which has been found is in the application of these principles to particular states of facts. The trouble always lies in determining from the facts the character of the agency. * * * Ever since the law on this subject was first declared, law writers and judges have attempted to define the different sorts of agency. Many of the discrepancies which apparently exist have arisen from these attempts at definition." McIntosh Co. v. Rice, 13 Colo. App. 393, 58 Pac. 358 (1899), at p. 361.

The true test as to what kind of an agent an agent is, is always what was actually intended. McClanahan v. Breeding, 172 Ind. 457, 88 N. E. 695 (1909). And the purposes to be accomplished are of great importance in ascertaining what was intended. As the court stated in McClanahan v. Breeding, supra, in construing an agency instrument:

"The intention not the letter, should control. The instrument should be so construed as to effectuate the object, if it can be ascertained." (At 88 N.E. 696)

One of the permissible aids in determining such intent is trade usage and custom. Cawthorn v. Lusk & Co., 97 Ala. 674, 11 So. 731 (1892); Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 N.E. 695 (1905). Agreements of agency are often interpreted "in the light of trade usage", Haynes Automobile Co. v. Woodill Auto Co., 163 Cal. 102, 124 Pac. 717, 718 (1912).

Thus legal substantiation may possibly be found for the Control Committee's interpretation in that such interpretation might be consistent with the intended meaning of the term as used in the Section, an intent possibly shown by alleged trade usage. There are two indications that such may be the generally accepted trade custom and usage of this term: (1) The term is contained in the Control Committee's letter, which states: "It seems logical that Foster and Wood Canning Company, under the Agreement and License, should be made to follow the same plan adopted by other canners, namely, either sell their domestic output through one firm as general accredited sales agents, or secure brokers in the markets in question." (2) The Section of the Marketing Agreement in question (Sec. 6) reads: "A canner operating through his accredited general sales agent * * *." The use of the word "his" in connection with "general accredited sales agent" may very possibly indicate that a canner is deemed to have but one such agent, - "his" agent.

On the other hand, there would not seem to be anything in the purpose of this Section in itself to warrant an unusual interpretation of the term "general sales agent". The phrase "accredited general sales agent" is employed in the Section in distinction to that of "broker". And this seems to be in line with a common business distinction that is often made between brokers and general sales agents. See Molloy v. Whitehall Cement Co., 116 App. Div. 839, 102 N.Y. Supp. 363 (1907). The broker is ordinarily only a "special agent", and serves an entirely different function. Because of this difference in relationship to the principal and in the functions they serve, there would seem to be many business reasons for differentiation in treatment such as is made in the Marketing Agreement and License. The courts have recognized the difference in the kinds of relationship to the principal between the general sales agent and the broker, and, as a result, have implied powers to the general sales agent which they have denied to the broker. Thus, a "general sales agent" is assumed to have broad power to do all acts incidental to the effectuation of sales. Potter v. Springfield Milling Co., 75 Miss. 532, 23 So. 259 (1898). He is "clothed with general power to sell the property without restrictions, has implied authority to select the purchaser, to fix the price, and to agree upon such ordinary incidental matters as the time and place of delivery, and the other ordinary and usual terms of a sale". Mechem, *supra*, Sect. 854. But a broker's authority will be assumed to be more limited. He has no implied authority, for instance, to fix the terms of delivery. Molloy v. Whitehall Cement Co., *supra*.

Of course, it is conceivable that the ordinary business distinction between a general sales agent and broker has real meaning in this particular industry only if the general agent is a sole agent, and that, therefore, when this industry uses the phrase "general agent" it can only mean a "sole agent". But the provision itself gives no such indication, and the reason for the use of the terms in it seems to be based upon the ordinary general business distinctions between the two.

Add the same conclusion is to be drawn from an examination of the Hearings held in connection with the Marketing Agreement in question. These Hearings give no support to the contention that it is the trade custom in this industry that a general sales agent of a canner shall be his sole agent. The provision in question received only slight consideration during the entire series of Hearings. It appeared, however, that an association of these "general sales agents" were there represented. And there was nothing that was said either by their representative or anyone else during the course of the Hearings in connection with the Section which indicates in any way that it is the custom in this trade for a canner to have only one general sales agent. (See Hearings, Proposed Marketing Agreement for Cling Peaches Canned in the State of California, July 31, 1933, pp. 165, 166.) Furthermore, the business seems to be transacted in such a way that the "agent" buys, - "takes title to the canned peaches" - (p. 165) and then markets them through other brokers. The transaction, thus, seems to be, in effect, a sale of the peaches from the canner to the so-called "agent". But if such an "agent" can, for any number of reasons, buy only a limited amount of the canner's output, there seems to be no reason why the canner cannot sell to other such "agents" also, if such

is necessary for the successful distribution of his output. The "accredited general sales agent" set-up seems to be merely one method of distribution, and it would seem to hamper rather than aid a canner's distribution to limit his outlet to only one co-called "sales agent".

Furthermore, rarely will the plain meaning of commonly accepted agency terms be avoided. Deering Co. v. Beatty, 107 Iowa 701, 77 N.W. 325 (1898). And the courts do not easily construe agencies to be exclusive.

"An exclusive agency will not be created by implication where the words of the contract do not naturally import the meaning." Indiana Road Machine Co. v. Lebanon Carriage Co., 25 Ky. L. 1763, 78 S.W. 861 (1904).

It is submitted, however, that the purposes of the Control Committee might well be accomplished through different reasoning. It could be maintained that A. M. Beebe Co. are not general agents, - not because they do not handle all of Foster & Wood's output, for that is not what the term "general sales agent" is normally or correctly taken to mean - but because they, in fact, have no such intimate, business agency relationship or connection as to warrant their being so considered, and because they are in fact merely ordinary, independent brokers. The Control Committee's letter refers to them as "a reputable firm of San Francisco brokers". As above pointed out, it may be necessary, for many reasons, to determine whether a firm is merely an independent broker on its own account, or in fact a general agent of another. To discover the true connection, such indicia as letterheads, signs, and in fact the whole business set-up of the alleged general selling agent can be investigated. See Molloy v. Whitehall Cement Co., supra.

It is in so investigating the actual relationship between these two firms that the word "accredited" assumes importance. Whether or not the A. M. Beebe Co. has any credentials whatsoever would be pertinent to a decision whether they are, - not only general agents, which in itself may be a subject of investigation - but "accredited" general agents. If there is nothing about A. M. Beebe Co., who ordinarily operate as independent brokers, to warrant the inference that they are in fact general sales agents - and "accredited" by Foster & Wood to be such - then the ruling can fairly be made that, as brokers, they are entitled only to the 2 1/2% commissions provided for by the Marketing Agreement and License. And brokers in the other markets would have to be relied upon, which is the result of the Control Committee desires, and which is also considered desirable by the General Crops Section "from the economic standpoint".

CONCLUSION

If, in fact, it is the trade custom that a "general accredited sales agent" is a canner's sole agent, and the term was used in the Marketing Agreement in accordance with the trade custom, then the Control Committee is correct in its interpretation. Some support may be found

for the conclusion that the Committee's interpretation is in accordance with trade custom, both in the correspondence submitted herewith and in the wording of the Section in question. However, there would seem to be equally strong, if not stronger, contrary conclusions which can be drawn both from the content of the provision and from the Hearings held in connection with the Marketing Agreement. Furthermore, the reluctance of the courts to extend ordinary agency terms beyond their natural meaning, and especially to construe agencies as exclusive, when such do not clearly appear to be the import of the terms used, makes it quite improbable that a court would accept the Control Committee's interpretation. However, the result attempted to be obtained by the Control Committee can, it seems, very probably be accomplished by an inquiry into the actual character and function of the alleged general sales agent in question. The indication from the correspondence is that such an inquiry would lead to the conclusion that the firm in question is in fact a broker and not a general sales agent, and therefore entitled to only 2 1/2% commissions.

Telford Taylor,
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Office of the General Counsel.

No. 95

MEMBER OF A COUNTY ALLOTMENT COMMITTEE

NOT AN OFFICER OF THE UNITED STATES.

A member of a County Allotment or Community Committee established under a Wheat Production or Corn-Hog Control Association, who is paid for his services by the Association, is not an officer of the United States, and, under accepted definitions of the term "officer" as used in constitutional and statutory provisions relating to the operations of Government, cannot be said to hold an "office * * * under the laws of the United States."

July 26, 1934.

MEMORANDUM OF LAW

on problem raised by Mr. John Vaughan, Superintendent of Public Instruction of the State of Oklahoma, in letter dated June 30, 1934.

QUESTION

Is a member of a County Allotment or Community Committee established under a Wheat Production or Corn-Hog Control Association, who is paid for his services by the Treasurer of the Association, an officer of the United States, or does he hold "an office of trust or profit * * * under the laws of the United States?"

OPINION

A member of such a committee is not an officer of the United States, and, under accepted definitions of the term "officer" as used in constitutional and statutory provisions relating to the operations of government, cannot be said to hold an "office * * * under the laws of the United States."

STATEMENT OF FACTS

Section 12, Article 2, of the Constitution of the State of Oklahoma provides:

"No member of Congress from this State, or person holding any office of trust or profit under the laws of any other State, or of the United States, shall hold any office of trust or profit under the laws of this State."

The question has arisen whether or not a member of a local school board may also serve on the "Crop Adjustment Board," by which it is assumed that reference is made to a County Allotment or Community Committee such as those organized under the Corn-Hog or Wheat Production Control Associations,

These associations have been established by the Secretary of Agriculture under the authority conferred upon him by Section 10 (b) of the Agricultural Adjustment Act. As stated in the articles of association,

they are

"organized for the purpose of cooperating with the Secretary of Agriculture in making effective the provisions of the Agricultural Adjustment Act . . . in their application to wheat . . ." (or to corn and hogs as the case may be).

In the case of each such association, the members of the Community Committees are elected by the members of the association as are the directors who constitute the Board of Directors, which in turn elects the members of the County Allotment Committee.

The duties of the Directors, Committees and Officers of the Association are set forth in the articles of association. In addition to the duties enumerated, it is provided in the case of the County Allotment Committee under the wheat control program that the Committee shall "also perform such further duties as may be prescribed for it by regulations which may be made from time to time by the Secretary of Agriculture." The County Allotment Committee under the corn-hog program is also to perform "such other duties as may be assigned to it." The Community Committee under the same program, in addition to its specified duties in obtaining contracts and data, is to perform "such other duties as may be assigned to it by the county allotment committee or the Corn-Hog Section." There is no similar blanket provision for the prescription of new duties for the Community Committees under the wheat program, but their work is clearly of a subordinate nature, consisting of assistance in obtaining contracts, the securing of needed data, etc.

Article VI, Section 11, of the articles of the Wheat Production Control Association provides

"The members of the County Allotment Committee, the members of the Community Committees. . . . may receive compensation if the Board of Directors so decides and if the Wheat Section approves."

A similar provision is made in the case of the Corn-Hog Control Association, the compensation being subject to approval by the Corn-Hog Section. Funds to pay committeemen for their services and other approved expenses of the Associations are drawn from moneys appropriated by the Agricultural Adjustment Act and are transmitted to the treasurers of the Associations for distribution to the persons entitled.

By Article II of articles of the Wheat Production Control Association

"The provisions of these Articles shall be subject to all regulations, applicable thereto, heretofore or hereafter prescribed by the Secretary of Agriculture."

The corresponding provision of Article II of the articles of the Corn-Hog Control Association reads:

"The provisions of these articles shall be subject to all regulations and administrative rulings applicable thereto, heretofore or hereafter prescribed by the Secretary of Agriculture, and to all instructions issued by the Corn-Hog Section, and shall be subject to amendment by the Secretary of Agriculture."

DISCUSSION

(1)

The method of appointment does not satisfy the constitutional requirements for the appointment of officers of the United States.

From the above statement of facts, it appears that the members of the Community and County Allotment Committee (hereafter called "Committeemen") are elected as such in each case by the members of the Association or by a Board of Directors consisting of directors elected by the members. They are not appointed by the Secretary. It follows that a Committeeman is not, by virtue of his selection as such, an officer of the United States, for the reason that he is not appointed in a manner required by the Constitution for the appointment of such officers.

The Constitution provides that the President.

" * * * shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Const., Art. II, Sec. 2.

That the methods herein provided for the appointment of officers are exclusive is well established. Discussing this question in United States v. Germaine 99 U.S. 508, 510 (1878), the Court said, at p. 509:

"The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary,

this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

It is clear that the Committeemen in question are not appointed to their positions by the Secretary of Agriculture as the head of an executive department or in any other mode prescribed by the Constitution. It may be conceded that the Control Associations are agencies established by the Secretary and that the Committeemen are officers of such Associations, but that will not suffice to make them officers of the United States. Thus the Commissioners of the Centennial Exhibition appointed by the President under an act creating the Commission and defining its duties are officers of the United States, but the secretary of the Commission, appointed by the Commission, although an officer of the Commission, is not an officer of the United States 15. Op. Atty. Gen. 187 (1877). To the same effect, in respect to the secretary of the commission for the World's Columbian Exposition see 4 Comp. Dec. 696 (1898). So also, the inspector-general of the National Home for Disabled Volunteer Soldiers, a corporation provided for by act of Congress, is not an officer of the United States, although his position is established by law and he is paid from public funds, for the reason, among others, that he is not appointed in the manner prescribed by the Constitution.

But it may be agreed that the Committeemen insofar as they are employed to perform duties and services for which they are compensated from federal funds are employed, and therefore appointed, by the Secretary. It does not appear from the articles of association that the Committeemen are employed or appointed by the Secretary in any direct sense to perform such services. The procedure indicated calls for a vote of the board of directors and the approval of the appropriate commodity section before the committeeman is entitled to compensation. The approval by the Secretary of the individual employment is not required, and there is apparently no formal procedure in the nature of an "appointment". Even were there in practice such procedure, with an approval by the Secretary of the individual appointment, the constitutional requirements regarding appointment would not be satisfied unless the appointment by the Secretary were required by law. This is indicated by U. S. v. Houat, 134 U. S. 303 (1888) in which it was held that a paymaster's clerk appointed by a paymaster with the approval of the Secretary of the Navy is not an officer of the United States for the reason that his appointment is not required to be made in one of the ways prescribed for the appointment of officers of the United States. The court said: (p. 307)

"If there were any statute which authorized the head of the Navy Department to appoint a paymaster's clerk, the technical argument, that the appointment in this case, although actually made by Paymaster Whitehouse and only approved by Harmony as Acting Secretary in a formal way,

with the approval of a half dozen other officers, might still be considered sufficient to call this an appointment by the head of that Department. But there is no statute authorizing the Secretary of the Navy to appoint a paymaster's clerk, nor is there any act requiring his approval of such an appointment, and the regulations of the navy do not seem to require any such appointment or approval for the holding of that position.

"The claimant, therefore, was not an officer, either appointed by the President, or under the authority of any law vesting such appointment in the head of a Department."

By Section 10(a) of the Agricultural Adjustment Act, the Secretary is authorized to appoint such officers and employees as may be necessary to execute the functions vested in him by the Act. He is also authorized by Section 10(c) to make necessary regulations having the force of law in order to carry out the powers vested in him by the Act. It is therefore open to him to provide by regulation for the creation of offices to the extent necessary for carrying out the control programs and to provide for the appointment by himself of the persons to fill the same. In the absence of such an exercise of authority by the Secretary, the employment of the Committeemen now in question is clearly within the rule of U. S. v. Mouat, supra. The facts, as at present understood, show no more than an administrative authorization of the employment of committeemen to perform certain services.

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The duties of Committeemen, and the manner in which they are prescribed, are not consistent with the status of officers of the United States.

The tests of what constitute an office include, in addition to the method by which appointments to it are made, the nature of the duties to be performed and the manner in which those duties are prescribed.

An "office" is said to embrace "the ideas of tenure, duration, emolument and duties." U. S. v. Hartwell, 6 Wall. 385 (1867). But, as pointed out in 16 Comp. Dec. 823, 826 (1910) a mere agency or employment may include those qualities also. The line of distinction is pointed out in 31 Op. Atty. Gen. 201, 203 (1918).

"Where the appointment, therefore, is made in one of the ways by which, under the Constitution, an officer may be appointed, the inquiry must always be into the nature of

the services to be rendered. If the appointee himself performs any of the functions of government, he is an officer. If he merely renders assistance to another in the performance of those functions, he is an employee."

Further, as stated in 29 Atty. Gen. 593, 595, (1912);

"By temure is not meant a holding for a fixed term. Many admitted officers do not so hold. The distinction is between those persons whose services are occasional and temporary, fixed by some contract of employment, and those whose services are general and indefinite in a line of duty prescribed by law."

See also U. S. v. Germaine, 99 U. S. 508, 511 (1878); Auffmordt v. Hedden, 137 U. S. 310, 327 (1890); U. S. v. Schlierholz, 137 Fed. 616, 619 (1905); Martin v. U. S., 168 Fed. 198, 202-203 (1909).

In the present case, the duties of Committeemen are not fixed by law but are enumerated in the articles of association. In the case of the Corn-Hog Association, it is expressly provided that additional duties may be assigned them, not by regulations or any formal action of the Secretary but, in the case of the Community Committees "by the county allotment committee or the Corn-Hog Section," and, in the case of the County Allotment Committee, presumably by the Corn-Hog Section alone. The articles of the Wheat Production Control Association are somewhat different in this respect. They provide, as to the County Allotment Committees, that they shall perform such further duties as may be prescribed by regulations made by the Secretary. Undoubtedly, a prescription of the duties of such committees by regulations having the force of law would be consistent with an exercise of the authority vested in the Secretary to appoint officers necessary to aid in carrying out the functions vested in him by the Act. It is not understood, however, that regulations have been issued to define the duties of such committeemen. Moreover, such prescription of duties could not cure the defect existing by virtue of the fact that the members of such committees are not required to be appointed in the manner provided by the Constitution.

With respect to such Committeemen, not as members of the County Allotment and Community Committees but as persons employed by and receiving compensation from the Agricultural Adjustment Administration, there is the further difficulty that their employment is temporary and occasional, subject to the approval of the Commodity Section and terminable at any time. It is not enough, to satisfy the tests of public office that the duties be fixed by law; they must be, if not of a permanent, at least of a continuing nature. As stated in 26 Op. Atty. Gen. 247, 249 (1907), after citing U. S. v. Maurice, 2 Block. 96 (1823), 26 Fed. Cas. 1211; U. S. v. Germaine, 99 U. S. 508, (1878); 22 Op. Atty. Gen. 184,

"the idea runs through all the cases that in order to constitute an office the employment must be continuing and not temporary."

See also 2 Comp. Dec. 467, 471 (1896); 15 Op. Atty. Gen. 187, 188 (1877). Under the wheat as well as under the corn-hog program Committeemen are employed only upon approval of the commodity sections which direct their services and have power to terminate them at any time. The services rendered by the Committeemen are thus "occasional and temporary, fixed by some contract of employment" and conform to the definition used in 29 Atty. Gen. 593, supra, to distinguish employees from officers.

On the facts as understood, therefore, it does not appear that the Secretary has created, or attempted to create, an "office." Considering therefore, the method of their selection, the terms of their employment, and the manner in which their services are prescribed and directed, it is my opinion that the members of the committees in question, although receiving compensation, are not officers of the United States.

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Such committeemen do not, under accepted rules of construction, occupy "an office of trust or profit under the laws . . . of the United States."

As has been noted, a Committeeman, although not an officer of the United States, may be an officer of the County or Community Committee. May he for that reason be regarded as holding "An office of trust or profit under the laws * * * * of the United States?"

It is, of course, true that the office he holds is one created under articles of association issued by a public officer acting under lawful authority. But the term "office" when used in constitutional provisions or in statutes relating to the functioning of government is ordinarily understood to mean a public office, the incumbent of which is an officer of the state. See North Jersey St. Ry. v. Jersey City, 74 N.J. Law 761, 67 Atl. 33, 35 (1907); Le Bosquet v. Meyers, 9 Ind. T. 75, 103 S.W. 770, 771 (1907); Evans v. Beattie, 137 S. C. 496 135 S.E. 538, 554 (1926)

It is true that the courts have recognized that Congress may sometimes use the word "officer" to cover individuals in the service of the Government who are not officers in the strict Constitutional sense. See U. S. v. Hondree, 124 U. S. 309, 713 (1888). But, as to the meaning of officer in the Constitutional sense, there can be no doubt as to certain essential tests: the office must be created by law and the appointment must be one required by law to be appointed by the President, or a court of law, or the head of a department. Accordingly, offices in agencies of the United States, although provided for by law but not required to be filled in the manner prescribed by the Constitution, are not "offices" in the constitutional sense or within the meaning of various federal statutes relating to double office holding or double salaries. 15 Op. Atty. Gen. 187

(1877); 8 Comp. Dec. 443 (1902); 6 Comp. Gen. 112 (1926); 4 Comp. Dec. 696 (1898); so also as to a commissionership provided for by treaty, 22 Op. Atty. Gen. 184 (1898);

The interpretation of the phrase "office of trust or profit under the laws * * * of the United States" as used in the Constitution of the State of Oklahoma is a question to be passed upon by the courts of law officers of that State. In the absence of a contrary interpretation however, it is assumed that by "office" is meant a public office in the strict sense of the term.

Telford, Taylor,
Acting Chief of Brief and Opinion Section,
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No. 98

MARKETING AGREEMENTS AND LICENSES -

BUYERS OF FLUE-CURED TOBACCO

Under the Agricultural Adjustment Act the Secretary of Agriculture has the power to enter into marketing agreements with, and to issue licenses to, buyers of flue-cured tobacco assuring to growers thereof a return which is above the present parity price, whenever such action is necessary in order to effectuate the declared policy.

July 30, 1934.

MEMORANDUM TO MR. PRESSMAN

QUESTION

Does the Secretary of Agriculture have the power (a) to enter into a Marketing Agreement, (b) to issue a License covering buyers of flue-cured tobacco assuring to growers thereof a return which is above the present parity price?

OPINION

The Secretary has the power to enter into such Marketing Agreements and to issue such Licenses whenever such action is necessary in order to effectuate the declared policy of Congress.

DISCUSSION

The power of the Secretary to enter into Marketing Agreements is derived from Section 8 of the Agricultural Adjustment Act, reading in part as follows:

"Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have the power - * * *

"(2) After due notice and opportunity for hearing, to enter into Marketing Agreements with processors, producers, associations of producers and others engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect interstate or foreign commerce."

The power of the Secretary to issue Licenses is derived from Section 8 of the Act, reading in part as follows:

"Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have the power - * * *

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, * * * as may be necessary to eliminate * * * charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof."

The declared policy which these powers are to be used to effectuate is stated in Section 2 of the Act:

"Sec. 2. It is hereby declared to be the policy of Congress -

"(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909-July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919-July 1929.

"(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

"(3) To protect the consumers' interest by re-adjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period, August 1909-July 1914."

I.

Congress has not called for the immediate establishment of parity purchasing power in absolute terms. It provided in Section 2 (2) that the parity of purchasing power shall be approached by gradual correction of the present inequalities at as rapid rate as is deemed feasible. (Cf. House Report, No. 6, 73rd Cong., 1st Sess., March 20, 1933, p. 2). The Secretary is authorized to seek to accomplish equality of purchasing power by establishing a rate to growers greater than present parity prices in two situations: First, where it appears that prices of commodities which farmers buy are likely to increase, the establishment and maintenance of parity may require the immediate fixing of a rate to growers at a level greater than the present parity price, but calculated to meet conditions expected in the near future; and second, where it appears that the most rapid feasible way of correcting the deficiency in the purchasing power of agricultural commodities is to fix a temporary price above parity. Especially where it is anticipated that the cost of farmer-consumed goods will rise, such a course would be appropriate. In other words, where the purpose in fixing a price above parity to the producer is merely to achieve and maintain actual parity as a result, a price above parity may be justified.

II.

Section 2 (1) of the Act declares the policy of Congress to achieve the reestablishment of prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles farmers buy equivalent to the purchasing power of agricultural commodities in the base period. Thus the policy is not to achieve parity prices, but to achieve such prices as will bring parity of agricultural purchasing power. The legislative history of the Act shows the meaning of this section to be that Congress intended to give the farmers the same bargaining power that they had during the base period. The use of parity prices is intended as a means to that end. (Cf. Senate Hearings on H.R. 3835, 73rd Cong., 1st Sess., p. 25) In view of the reduction of acreage used for tobacco production under the commodity benefit contracts authorized by Section 8 (1) of the Act, to return to the grower no more than the parity price would be to give him less than his parity bargaining power. Although the commodity return on a given amount of tobacco would be as great as in the base period, the total commodity return to the producer would be smaller because his crop is smaller. The only reasonable interpretation of the concept "purchasing power of agricultural commodities" is not that a single unit of the commodity shall have a purchasing power equal to that in the base period, but that the crop of the commodity shall have such equal purchasing power. The farmer's purchasing power will not be increased by a higher price for his product if the output of that product is unduly restricted. The Secretary is, therefore, authorized under Section 2 (1) to

establish prices to farmers at a level higher than parity prices in order to establish the bargaining power of farmers at the level obtaining in the base period.

III.

There remains the question whether the validity of such a marketing agreement or license would be defeated by Section 2 (3) of the Act. It should be noted at the outset that the purport of this section is somewhat obscure. It stipulates for protection of the consumer by prohibiting such a readjustment of farm production as would

" * * * increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period, August 1909-July 1914."

Literally construed, this section seems to forbid that, out of the consumers' total retail expenditures for agricultural commodities, a greater percentage shall be returned to the farmer than was returned during the base period. But such a construction protects the middle man alone, and there is strong reason to believe that it does not represent the true intent of Congress, since Section 2 (3) is, on its face, intended to protect the interest of the consumer rather than that of the middle man. It seems probable, therefore, that what Congress really intended was to forbid that, out of the consumers' total retail expenditures, a greater percentage should be expended for agricultural commodities than was expended during the base period. While there may be some doubt whether this interpretation is possible with due regard to the grammatical construction of the section as it stands, it is obviously more in accord with the declared purpose to protect the consumers' interest.

However, I do not believe that it is necessary at this time to pass upon the question raised in the foregoing paragraph. Even assuming that the more liberal construction suggested above be adopted, it seems clear that Section 2 (3) was not intended to limit or impede execution of the policy expressed in Section 2 (1), but that it was intended only to insure that the consumers' interest would not be damaged by an increase in the purchasing power of agricultural commodities above their power in the base period, in which case there must probably ensue an increase in the consumers' expenditures for agricultural commodities, or else a decline in their consumption. This interpretation is plainly in accord with the clear intention of Congress not to favor one portion of the public at the expense of another. It should again be recognized, however, that the true intendment of Section 2 (3) is difficult to ascertain, and it therefore cannot be anticipated with any certainty that my opinion as here expressed would be sustained by the courts.

IV.

It thus appears that the Secretary would be authorized to establish prices to growers at a level higher than parity prices. There are, however, certain limitations upon the extent of this authorization. In each case the authority is derived from the purpose for which it is used and would have to rest upon a factual basis showing that the measure adopted is at least reasonably calculated to effect that purpose.

The authority derived under the argument made in paragraph I above gives the Secretary, in an appropriate case, the freest discretion. It enables him to fix prices above parity prices wherever he may find it necessary, for the ultimate correction of inequalities of purchasing power, to do so. He may then select any level he may find is best calculated to achieve actual parity as rapidly as possible, and to maintain the same. The authority derived under argument II above is limited by the level at which the bargaining power of the farmer will be restored to its value in the base period. That is to say, prices may be fixed above parity only to the extent that production is reduced below the level as obtaining in the base period.

In any event, the Secretary would not be authorized in the issuance of a license to establish a return to a grower greater than parity price unless such a provision in the license be calculated to accomplish the restoration of normal economic conditions in the marketing of the commodity and the financing thereof. Even where the Congressional policy is otherwise satisfied, a clause in the license obstructing the restoration of normal economic conditions in the marketing and financing of the commodity would be invalidated by the express language of the Act.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 97

PROCEEDS OF TAX ON PROCESSING IN THE UNITED
STATES OF PHILIPPINE SUGAR--PROCEEDS OF
COMPENSATING TAXES ON PHILIPPINE SUGAR

Under Section 15 of the Agricultural Adjustment Act, as amended, monies collected on processing within continental United States of Philippine sugar may be covered into a fund to be expended in the Philippines for the purposes mentioned in that Section, without the necessity of an extension of the Agricultural Adjustment Act to the Philippines.

Section 15 (e) of the Agricultural Adjustment Act is still in effect, and compensatory taxes on Philippine sugar must still be covered into the special fund provided for by that provision.

July 31, 1934.

MEMORANDUM TO MR. GILCHRIST

Pursuant to your inquiry of June 15, I reply as follows:

QUESTION I

Under Section 8 of the Sugar Bill (which amends Section 15 of the Agricultural Adjustment Act) may the tax collected on the processing of Philippine sugarcane within the United States be covered into a separate fund to be expended in the Philippines for the purposes mentioned if the Act be not extended to the Philippines?

OPINION

On established rules of statutory construction, the effect of a proviso must be confined to the provisions preceding it, and where the office of the proviso is clearly explanatory of foregoing matter, its application cannot be extended to the subsequent portion of the Section. Moreover, since a proviso must be strictly construed to include no case not within the letter of its terms, it is concluded that the monies collected on the processing within continental United States of Philippine sugar may be covered into the fund for the purpose mentioned without an extension of the Agricultural Adjustment Act to the Philippine Islands.

DISCUSSION

Section 8 of the Sugar Bill reads as follows:

"Sec. 8. Section 15 of the Agricultural Adjustment Act, as amended, is amended by adding at the end thereof the following new subsection:

(f) The President, in his discretion, is authorized by proclamation to decree that all or part of the taxes collected from the processing of sugar beets or sugarcane in Puerto Rico, The Territory of Hawaii, the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the Island of Guam (if the provisions of this title are made applicable thereto), and/or upon the processing in continental United States of sugar produced in, or coming from, said areas, shall not be covered into the general fund of the Treasury of the United States but shall be held as a separate fund, in the name of the respective area to which related, to be used and expended for the benefit of agriculture and/or paid as rental or benefit payments in connection with the reduction in the acreage, or reduction in the production for market, or both, of sugar beets and/or sugarcane, and/or used and expended for expansion of markets and for removal of surplus agricultural products in such areas, respectively, as the Secretary of Agriculture, with the approval of the President, shall direct." (Italics supplied.)

The legislative history of this provision throws little light on the problem here in question. The Section was introduced in substantially this form in the first draft of the Act and only minor verbal changes were made in it before its final passage. The explanation of the statute put forward by the managers of the House merely summarized the content of the Section as follows:

"Section 8 provides that the President may by proclamation decree that all or part of the taxes collected from the processing of sugar beets or sugarcane in Puerto Rico, the Territory of Hawaii, the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam (if the provisions of this title are not, or are made, applicable thereto), and/or collected upon the processing in continental United States of sugar produced in said areas, shall not be covered into the general fund of the Treasury of the United States, but shall be held as a separate fund in the name of the respective area to which related, and shall be used in such area for the benefit of agriculture and/or as rental or benefit

payments in connection with the reduction in the acreage of reduction in the production for market, or both, of sugar beets and/or sugarcane, and/or for expansion of markets and for removal of surplus agricultural products. The committee amendment to this section is a clarifying amendment."

The clear terms of this Section, however, compel the inference that the separate fund of monies collected upon the processing in continental United States of sugar produced in the Philippines may be established without the extension of the Agricultural Adjustment Act for this area. It is settled that the natural and appropriate office of a proviso is to restrain or qualify the generality of the language that it follows (Wayman v. Southard, 10 Wheat. 1 (1825); Long v. Palmer, 16 Pet. 65 (1842) and it is therefore apparent that the qualification contained in the phrase "if the provisions of this title are made applicable thereto" refers only to the preceding portion of the provision. Moreover, it is plain from the position of the clause here in question that its function is explanatory; that is, it was inserted to guard against the possible misinterpretation that authority is given under the Section to collect processing taxes in these areas without the extension of the Agricultural Adjustment Act - a use of the proviso well recognized in the principle of construction that a proviso may be employed, out of abundant caution, merely to explain the general words of the enactment and to prevent a possible construction that is not intended. Detroit Citizens' Street Railway Company v. Detroit, 64 Fed. 628 (1894); Terrell v. Paducah, 122 Ky. 331, 92 S. W. 310 (1906). In addition to the fact that a proviso must normally be read to modify only preceding language, a phrase which is clearly explanatory in purpose cannot be extended in effect to a portion of the Section on which it has no bearing, since such an interpretation would be to read in an unintended condition which would defeat the manifest purpose of the Congress.

The view that the sole condition to the establishment of the fund laid down in the instant provision is that the President decree by proclamation that this be done, is further supported by the rule of construction that a proviso which operates to limit the application of the provisions of a statute should be strictly construed to include no case not within the letter of the proviso. United States v. Dickson, 15 Pet. 141 (1841); Detroit Citizens' Street Railway v. Detroit, 64 Fed. 628 (1894). Since, as has been shown, the function of the phrase "if the provisions of this title are made applicable thereto" is exhausted when it has served to clarify the fact that the authority granted to the President under the instant provision is ineffective as to taxes collected from the processing of sugar beets or sugarcane in these areas unless the Agricultural Adjustment Act be extended thereto, the application of the proviso to the subsequent portion of the provision to which it is clearly unrelated cannot be sanctioned, on the rule of construction stated above, without explicit language to that effect. The terms of the Section

warrant no such broad interpretation of the ambit of the proviso and it must therefore be confined to the preceding part of the provision under discussion.

QUESTION II

If the President decrees the establishment of a separate fund under Section 15 (f) of the Agricultural Adjustment Act, would the compensatory taxes collected under Section 15 (e) go into that special fund, or would they still go into the Philippine Treasury?

OPINION

In view of the strong presumption against repeal by implication in the case of contemporaneous statutes, and the fact that the establishment of separate funds under Section 15 (e) and 15 (f) involve no inconsistency, Section 15 (e) is still in effect and compensatory taxes on Philippine sugar must still be covered into the special fund provided for by that provision.

DISCUSSION

Section 15 (e) of the Agricultural Adjustment Act, as amended, provides as follows:

"During any period for which a processing tax is in effect with respect to any commodity there shall be levied, assessed, collected, and paid upon any article processed or manufactured wholly or partly from such commodity and imported into the United States or any possession thereof to which this title applies, from any foreign country or from any possession of the United States to which this title does not apply, whether imported as merchandise or as a container of merchandise, or otherwise, a compensating tax equal to the amount of the processing tax in effect with respect to domestic processing of such commodity at the time of importation; Provided, That all taxes collected under this subsection upon articles coming from the possessions of the United States to which this title does not apply shall not be covered into the general fund of the Treasury of the United States but shall be held

as a separate fund and paid into the Treasury of the said possessions, respectively, to be used and expended by the governments thereof for the benefit of agriculture. Such tax shall be paid prior to the release of the article from customs custody or control."

Obviously, the monies collected under the compensating tax as provided for in Section 15 (e) are distinct from those which may be covered into the fund under Section 15 (f). The language of each provision is clear and no inconsistency can be found which would result from the simultaneous operation of these Sections. In view of the strong presumption against repeal by implication in the case of contemporaneous, or nearly contemporaneous statutes, (Utah University v. Richards, 20 Utah 457, 59 Pac. 96 (1899)) and the absence of conflict between the two, it is concluded that Section 15 (e) is unaffected by the passage of 15 (f), and that compensatory taxes collected under Section 15 (e) still go into the special fund established under that provision.

Telford Taylor,
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Office of the General Counsel.

No. 98

SUGAR IMPORTED IN EXCESS OF 1934 QUOTAS

Under Section 8a(1)(E) of the Agricultural Adjustment Act the Secretary may make available for consumption, as part of the 1935 quotas, sugar produced in excess of the 1934 quotas in areas subject to the Act.

Opinion Section Memorandum No. 142
Dated July 31, 1934.

July 31, 1934.

MEMORANDUM TO MR. GILCHRIST

Pursuant to your inquiry of June 21st I reply as follows:

QUESTION

May sugar brought into continental United States in excess of the respective 1934 quotas be made available as part of the 1935 quotas for the respective areas?

REPLY

Under Section 8a(1)(E) of the Agricultural Adjustment Act the Secretary may make available for consumption as part of the 1935 quotas sugar produced in excess of the 1934 quotas in areas subject to the Act.

DISCUSSION

The Agricultural Adjustment Act, as amended by the Sugar Act, sets out in Section 8a(1) the system under which the quotas for any given calendar year are to be fixed. In Section 8a(2)(E), however, it is provided that:

"Notwithstanding the provisions of paragraphs (A) to (C), inclusive of subsection (1) of this section, the Secretary of Agriculture may, in order to effectuate the declared policy of this Act, from time to time, by orders or regulations, deduct from the quotas for production, importing, receiving, and/or marketing, and/or from the allotment thereof, established pursuant to said paragraphs, in any given year, an amount for each year, respectively, representing the surplus stocks of sugar produced in that area, or a portion of the total surplus stocks of sugar produced in that area, in whole or in part, which may have accumulated in the year next preceeding, over and above the quotas established for such year.

The clear import of this provision is that excess sugar produced in any areas subject to the 1934 quotas may be made available for consumption as part of the 1935 quotas. The Sugar Section may therefore issue a press release to the effect that any sugar brought into continental United States in excess of the respective 1934 quotas may be made available for consumption as part of the 1935 quotas for the respective areas.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 99.

FUNDS FOR EMERGENCY CATTLE PROGRAM

Under the Agricultural Adjustment Act, payments made to reduce acreage of feed and small grain crops would not justify a processing tax on cattle.

Funds made available under the Jones-Connally (cattle) Act may not be used for all of the purposes of the Agricultural Adjustment Act but only for those specified in Sections 12(a) and 12 (b)

It is doubtful whether the funds appropriated by the "Emergency Appropriation Act, fiscal year 1935," may be employed for all the purposes of the Agricultural Adjustment Act. It would seem that the only purposes under the Act for which the funds could be employed are those which would have the effect of giving direct relief to agricultural areas "stricken" by drought, or by other similar disaster. The Emergency Cattle Program would come within such category. No changes are necessary in the Executive Order allocating funds to the Secretary of Agriculture to make the funds available for payment under the cattle program.

Opinion Section Memorandum No. 143
Dated August 1, 1934.

August 1, 1934

MEMORANDUM TO MR. A. G. BLACK

Pursuant to your request for an opinion with reference to several questions, I submit the following:

QUESTIONS

1. If it were factually established that a contract for the reduction in acreage of feed and small grain crops would result in reduction in the production for market of cattle, could a payment made under such contract justify a processing tax on cattle?
2. May the funds made available under the Jones-Connally Act (the Cattle Bill) be used for all of the purposes of the Agricultural Adjustment Act?
3. May the funds appropriated for allocation by the President in "Emergency Appropriation Act, fiscal year 1935" be allocated by the President for all purposes of the Agricultural Adjustment Act, including payments now being made in the Emergency Cattle Agreement? Are changes necessary in the Executive Order allocating funds to the Secretary of Agriculture so that the funds can be made available for payments under the cattle program?

OPINIONS

1. Payments made to reduce acreage of feed and small grain crops would not justify a processing tax on cattle.
2. The funds made available under the Cattle Bill may not be used for all of the purposes of the Agricultural Adjustment Act, but only for those purposes specified in Section 12 (a) and 12 (b) of the Act.

3. It is doubtful whether the funds may be employed for all the purposes of the Agricultural Adjustment Act. It would seem that the only purposes under the Act for which the funds could be employed are those which would have the effect of giving direct relief to agricultural areas "stricken" by drought, or by other similar disaster. The Emergency Cattle Program would come within such category. No changes are necessary in the Executive Order allocating funds to the Secretary of Agriculture so that the funds can be made available for payment under the cattle program.

DISCUSSION

I

Payments made to reduce acreage of feed and small grain crops would not justify a processing tax on cattle.

It is clear under the Act that where a processing tax is levied upon a commodity, benefit payments must be made to producers of that commodity. Section 8 (1) of the Act provides:

"Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power -

"(1) To provide for the reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith * * * "

Furthermore, Section 9 (a) provides:

"Then the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity * * * a processing tax shall be in effect with respect to such commodity * * * ;"

The conclusion would seem inevitable that Section 9 (a), in specifying that payments should be made "with respect to" any commodity, would not include making a payment to producers of other commodities on the grounds that some action taken by such producers in some indirect manner tends to bring about a reduction in production of the first commodity. Also, although Section 8 (1) does not specify to what producers the benefit payment should be made, - merely stating "through agreements with producers" -

the phrase obviously refers to producers of the basic commodity concerning which the reduction program is put into effect. Therefore, benefit payments to producers of other commodities would not justify a tax on cattle without some benefit payment being made also to cattle producers.

This conclusion does not preclude the possibility of a program being put into operation which would have the effect of removing surpluses of feed and small grain crops, which program could be financed by funds raised from the cattle processing taxes, provided some benefit payments were made to cattle producers. The Act contains no requirement that all of the taxes collected upon the processing of a certain commodity should be used for benefit payments to producers of that commodity. This was recognized in the debates on the Bill:

"MR. BANKHEAD. * * * there is nothing in the bill requiring a segregation of the processing tax for application to any particular commodity. In other words, it all goes into one fund, but the distribution of it is left entirely to the discretion of the Secretary of Agriculture."
Cong. Rec., Vol. 77, p. 1365.

(And see Opinion No. 85). Furthermore, Section 12 (b) of the Act provides that "the proceeds derived from all taxes imposed under this title" may be used by the Secretary for the "removal of surplus agricultural products."

II.

The funds made available under the Cattle Bill may not be used for all of the purposes of the Agricultural Adjustment Act, but only for those purposes specified in Section 12 (a) and 12 (b) of the Act.

There are two sections of the Cattle Bill which authorize the appropriation of funds for certain purposes. Section 2 authorizes the appropriation of funds so that the Secretary may finance

* * * * surplus reductions and production adjustments with respect to the dairy and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, * * *."

Section 6 of the Cattle Bill, however, authorizes funds to be appropriated for the purchase of cattle for relief purposes. It is assumed that the question refers merely to Section 2 quoted above.

It is seen that Section 2 authorizes expenditures for all the purposes described in subsections (a) and (b) of Section 12 of the Agricultural Adjustment Act. These subsections (a) and (b) of Section 12 read as follows:

"(a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage or reduction in production for market under part 2 of this title. Such sum shall remain available until expended. * * *

"(b) In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection."

Thus, the only purposes of the Agricultural Adjustment Act for which the funds made available under the Cattle Bill may be used are:

1. Administrative expenses.
2. Rental and benefit payments.
3. Expansion of markets.
4. Removal of surplus agricultural products.
5. Refunds on taxes.

There are other purposes and powers in the Agricultural Adjustment Act in addition to those listed above, however, such as those pertaining to cotton option contracts, marketing agreements, and licenses. To finance these activities, money appropriated under the Cattle Bill is not available.

III

It is doubtful whether the funds appropriated by the "Emergency Appropriation Act, fiscal year 1935," may

be employed for all the purposes of the Agricultural Adjustment Act. It would seem that the only purposes under the Act for which the funds could be employed are those which would have the effect of giving direct relief to agricultural areas "stricken" by drought, or by other similar disaster. The Emergency Cattle Program would come within such category. No changes are necessary in the Executive Order allocating funds to the Secretary of Agriculture so that the funds can be made available for payment under the cattle program.

The pertinent part of the "Emergency Appropriation Act, fiscal year 1935," reads as follows:

"Emergency Relief..

"To meet the emergency and necessity for relief in stricken agricultural areas, to remain available until June 30, 1935, \$525,000,000, to be allocated by the President to supplement the appropriations heretofore made for emergency purposes * * *."
(Underscoring supplied)

The question thus arises as to the meaning of the phrase "to supplement the appropriations heretofore made for emergency purposes." The Act itself contains no indication as to what the appropriations "heretofore" made are or mean.

It seems clear, however, that this appropriation was primarily enacted for drought relief purposes. The very next paragraph in the Act specifically refers to drought, stating:

"If, during the present drought emergency, a carrier subject to the Interstate Commerce Act shall, at the request of any agent of the United States, authorized so to do, establish special rates for the benefit of drought sufferers such a carrier shall not be deemed to have violated the Interstate Commerce Act with reference to undue preference or unjust discrimination by reason of the fact that it applies such special rates only to those designated as drought sufferers by the authorized agents of the United States or of any State." (Underscoring supplied)

The legislative history of the Bill also justifies this conclusion. As the Bill was originally reported in the House, there was no special appropriation of any kind for drought relief or "for relief in stricken agricultural areas" (Report House Committee on Appropriation, 73d Congress, 2d Session, No. 1879, June 2, 1934).

But affording relief to drought sufferers by this Bill was in the minds of Congressmen, for inquiry disclosed that it was contemplated that the President could draw on unobligated balances of the Reconstruction Finance Corporation, made possible by the Bill, for expenditures for drought purposes (Congressional Record, June 4, 1934, pp. 19753-7, 10760). The appropriation in question first appeared in a Senate amendment to the House Bill for \$450,000,000 with the broad phrase employed "for relief of persons in stricken agricultural areas". But in the accompanying Senate Report of the Committee on Appropriations, this \$450,000,000 was listed under the heading "Drought Relief" (Report, Senate Committee on Appropriations, 73d Congress, 2d Session, No. 1418, p. 4, June 6, 1934). On June 9, however, President Roosevelt sent a special message to both houses of Congress asking for \$525,000,000 for drought relief purposes, and stating that he had arrived at this figure "after a conference with members of Congress from the affected regions." (Congressional Record, June 9, 1934, pp. 11305, 11315.) A new amendment was then made to the Bill, including the amount the President requested, and also specifying some of the purposes enumerated in his message (Conference Report No. 2057, House of Representatives, 73d Congress, 2d Session, June 15, 1934). And all during the debate on this amendment it was only the drought that was referred to (Cong. Rec., June 15, 1934, pp. 11980-11986).

It is thus obvious that from the beginning Congress had drought relief in mind as one of the primary functions of this Emergency Appropriation Bill, that the specific appropriation for \$525,000,000 in question resulted from a Presidential Message pertaining only to the drought, and that it was the drought which was uppermost in the minds of the Congressmen when the appropriation was debated and passed.

"Appropriations heretofore made for emergency purposes" might conceivably include all the appropriations made in connection with all of the purposes of every "emergency" piece of legislation passed by the Seventy-Third Congress. It thus might include all of the purposes of the National Industrial Recovery Act or the Tennessee Valley Authority Act. But it would hardly seem reasonable to conclude, in the light of the manner in which this appropriation was initiated, and also in the light of what was obviously in the minds of Congress when the bill was passed, that Congress intended this appropriation "for relief in stricken agricultural areas" to possibly be diverted to all the purposes of all the other "emergency" Acts dealing with economic relief of entirely different kinds which it had "heretofore" passed. In like manner, there would seem to be many activities under the Agricultural Adjustment Act which would have but a remote effect upon the kind of relief that would be considered necessary "to meet the emergency" in drought-stricken areas.

It would, therefore, seem that the appropriation in question could not be used for all the purposes of the Agricultural Adjustment Act, - for some of them might conceivably afford drought sufferers very little emergency relief - but that it could be employed only for

those purposes of the Agricultural Adjustment Act, or of any other "emergency" legislation, which would be consistent with giving emergency aid in agricultural areas stricken in the manner in which Congress had in mind when it passed this appropriation. There are, however, certain programs which could be undertaken under the Agricultural Adjustment Act which would fall within this category. A program initiated pursuant to Section 6 of the Cattle Bill, which authorizes to be appropriated the sum of \$50,000,000 for the purpose of dairy and beef products for distribution for relief purposes, would undoubtedly be proper, as would also one undertaken pursuant to Section 12 (b) of the Agricultural Adjustment Act for the removal of surplus agricultural commodities.

It should be noted that in the paragraph directly preceding that containing this appropriation, - the first paragraph under this Title 2, entitled "Emergency Appropriations" - appropriations are made for carrying out the purposes of four Acts, the Federal Emergency Relief Act of 1933, the Tennessee Valley Authority Act, the National Industrial Recovery Act, and an Unemployment Act. Also, in the latter part of the same paragraph, unobligated balances of the Reconstruction Finance Corporation are again made available for the purposes of the Federal Emergency Relief Act of 1933 and Title II of the National Industrial Recovery Act (Public Works). It may, therefore, be argued that in stating that the funds appropriated for relief in stricken agricultural areas are to supplement the appropriations "heretofore" made for emergency purposes, it was intended to limit the supplementing to these four Acts referred to in the previous paragraph, insofar as their purposes lend themselves to drought relief. Or it may be argued that because the aforementioned unobligated balances of the Reconstruction Finance Corporation were originally intended to be used for drought relief, and that because even now they are specifically made available for general relief under the Emergency Relief Act, it is these unobligated balances which were intended to be supplemented as "the appropriations heretofore made for emergency purposes".

But it would seem that the phrase could not reasonably be so limited. First, there seems to be no closer relationship between these agricultural "emergency relief" funds and, with the exception of the Emergency Relief Act - all of the Acts above mentioned, then there is between these funds and other "emergency" legislation, especially such other "emergency" legislation as specifically pertains to agriculture, such as the Agricultural Adjustment Act. Second, the phrase employed, - "the appropriations heretofore made for emergency purposes" - is an extremely broad one. It would have been easy for Congress to have employed a more limited phrase clearly restricting the appropriation to the Acts just previously mentioned, or merely to the unobligated Reconstruction Finance Corporation balances, if such was their intent. Finally, an appropriation had already, in the previous paragraph, been made for all of the Acts in question, and it would seem more likely that Congress intended to also supplement

emergency legislation other than that for which it had already just made supplementary appropriations.

It would thus seem clear that the funds appropriated in the "Emergency Appropriation Act, fiscal year 1935" "to supplement the appropriation heretofore made for emergency purposes" can be employed for all the purposes of the many "emergency" Acts which had theretofore been passed, - including the Agricultural Adjustment Act - provided such purposes are consistent with emergency drought relief.

It should also be noted, however, that the purposes of the Emergency Cattle Agreement are consistent with the direct and primary purposes of the "Emergency Appropriation Act", - "for relief in stricken agricultural areas" - so that the Emergency Cattle Program need not be fitted into any Agricultural Adjustment Program at all in order to receive financial aid under the Emergency Appropriation Act. Relieving farmers of the burden of drought-stricken cattle, and thereby placing money in their hands for subsistence purposes, is undoubtedly affording "relief" in stricken areas within the contemplations of the Act. Furthermore, the Act itself provides that the funds may be used:

" * * * for (1) making loans to farmers for, and/or (2) the purchase, sale, gift, or other disposition of, seed, feed, freight, summer fallowing and similar purposes; * * *."

While no specific mention is made of the purchase of livestock, nevertheless, it would seem that it is clearly included within the phrase "and similar purposes". Strong indication that the purchase of livestock was so intended to be included is contained in the very Presidential Message which in large measure motivated this appropriation. This message requested this \$525,000,000 appropriation, and proceeded to break down this lump sum by enumerating the programs for which the funds would be employed. And one enumeration specifically pointed out that of the funds to be appropriated, a large amount would be necessary "for livestock purchase". (Cong. Rec., June 9, 1934, p. 11305.) "seed", "feed", and "freight", - set out in the Bill - Also were enumerated in the break-down. These specifically do appear in the Bill, but the fact that the appropriation was passed for exactly the amount the President requested strongly indicates that the other items enumerated in the Message break-down were meant to be included within the broad phrase "and similar purposes", for all the purposes appearing in the Message for which the funds were to be spent "similarly" pertained to the one broad purpose of drought relief.

Furthermore, the Executive Order, dated June 23, 1934, allocating funds to various agencies pursuant to the provisions of the Act, specifically indicates that it was intended that the purchase of livestock is to be included among the authorizations of the Act.

For the Order in terms allocates funds to the Secretary of Agriculture "for the purchase, sale, gift or other disposition of seed, feed, and livestock and for transportation thereof." Finally, at the hearings upon this Bill, it was repeatedly recognized that of the \$525,000,000 proposed to be appropriated, purchases of cattle were contemplated as part of the drought relief program. The item in the Presidential break-down referring to the purchase of livestock was considered and recognized as an integral part of the drought relief program. (See Hearings before the Subcommittee of the Committee on Appropriations, U. S. Senate, 73d Congress, 2d Session, on H.R. 9830, pp. 174, 176, 178, 192, 201, 202.)

"Mr. DAVIS. * * * This \$75,000,000 which constitutes an item on the estimate there is recommended as a supplement to the \$75,000,000 available under the Jones-Connally Act.

"Senator McKELLAR. That is for the purchase of livestock.

"Mr. DAVIS. Yes." (Hearings, supra, p. 201. Underscoring supplied.)

(But see Decision of the Comptroller General, A-56438, July 31, 1934, withholding approval of a draft of Public Voucher and Emergency Livestock Agreement proposed to be used in connection with the purchase of livestock under this Act.)

Concerning the Executive Order issued by the President on June 23, 1934, allocating funds appropriated by the Act in question, no changes of any kind are necessary to make the funds properly available under the cattle program. In providing both for the purchase of livestock and the transportation thereof, the President's Order clearly covers the Emergency Cattle Program. If for some reason, however, it is concluded that the expenditures should be made pursuant to an Agricultural Adjustment Act program or to one of the purposes contained in the Cattle Bill, which amends the Agricultural Adjustment Act, or in any of the amendments thereto, consistent with meeting the emergency and necessity for relief in stricken agricultural areas. It would not seem wise to restrict funds to some specific program under the Act or its amendments, because a shift from one program to another might at any time be found to be desirable or necessary.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 100

DETERMINATION OF "PARITY" UNDER THE
AGRICULTURAL ADJUSTMENT ACT

Where the data available for any crop are insufficient to permit a direct determination of "parity" for the statutory base period, the Secretary is not authorized to adopt a more convenient base period; but he may employ statistical methods for the approximation of "parity" for the statutory base period, if a sufficiently reliable approximation can be made thereby.

Opinion Section Memorandum No. 145.
Dated August 1, 1934.

August 1, 1934.

MEMORANDUM TO MR. PRESSMAN

In reply to your memorandum dated May 5, 1934, I render my opinion upon the following:

QUESTIONS

- A. Where the data available for any crop are insufficient to permit the direct determination of parity for the statutory base period, would the Secretary of Agriculture be authorized to adopt a more convenient base period?
- B. Would the Secretary be authorized in such a case to employ statistical methods for the approximation of parity for the statutory base period?

OPINION

I am of the opinion that where the data available for any crop are insufficient to permit the direct determination of parity for the statutory base period, the Secretary would not be authorized to adopt a more convenient base period, but that he would be authorized to employ statistical methods for the approximation of parity for the statutory base period, if a sufficiently reliable approximation can in fact be made.

DISCUSSION

The Act fixes the period to be used as a base period for the determination of parity. It expressly states that the base period for all agricultural commodities (except tobacco) shall be the prewar period, August 1909-July 1914. The Secretary has no discretion to disregard this explicit designation.

The Act does not prescribe, however, the method by which parity is to be ascertained. The establishment and maintenance of parity is a goal which can be at best only approximately achieved. It is plain that Congress did not intend to sacrifice the substance of the program of emergency relief to an unexpressed requirement of strict accuracy in its application. Where actual parity cannot be directly ascertained, the purposes of the Act can be effectuated only by a statistical approximation. Such an approximation, if sufficiently reliable not to entail undue discrimination, would be authorized under the Act.

Whether such an approximation would be sufficiently reliable cannot be determined except in a particular case and on the particular facts. No general method can be established applicable to the various crops indifferently. The data available for each crop differ in the degree of their completeness and connectedness, in the degree of their reliability, and in the methods of manipulation necessary, because of differences of production factors, of marketing factors, of financing factors, and of classification systems, to insure their correct interpretation. It must remain uncertain in advance whether the method devised by the statisticians of the Department as the best in the particular case would prove to be sufficiently reliable for legal purposes.

I have consulted on this matter with Mr. Louis Bean of the Bureau of Agricultural Economics. He tells me that he could not undertake to state that appropriate methods could be devised until he is presented with a concrete problem. It is clear that a legal opinion must wait upon the prior solution of the statistical problem.

Helford Taylor,
Acting Chief, Brief and Opinion Section,
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